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CURRENT EVENTS.

IMPERFECT LEGAL REMEDIES—THE LAW OF LIBEL.—The arrogant boast that the common law of England is "the perfection of reason," is falsified more strkingly by the imperfection of the remedies which it provides for wrongs than in any other manner. It is a solecism to say that perfection can be amended, and the common law unamended would, at this stage of civilization, be unendurable. By legislative act and judicial construction, amendments have overlaid the common law proper, until it has become merely a nucleus of a vast mass of legal doctrine. And yet much remains to be done, and in no respect is the hand of reform more needed than in this very important branch of the law which provides redress for wrongs suffered by individuals, and punishment of those who inflict injuries upon them. We propose to point out some of the imperfections in the administration of justice, and suggest the amendments which public policy, in our judgment, seem to require. For every wrong there should be, and generally is, a remedy; but it is often defective, and sometimes illusory. This is one of the great scandals of the profession, and has been for many centuries the theme for the moralist, the satirist and the wit. It is well understood that although it is a misfortune to lose a lawsuit, it is often a calamity almost equally serious to gain one. True, the medical man cannot sugarcoat *all* his pills and help his patients out of the world without their suffering some of the pangs of mortality; yet we do expect him, by the use of opiates and anesthetics, morphine, chloral, ether, and the like, to launch them into eternity with the least possible friction. It is to the credit of the profession that doctors usually fulfill all reasonable expectations of this character and inflict only necessary tortures. We cannot award the same praise to our own profession, although we have certainly improved greatly since the days (within this boasted nineteenth century) when men, with no other charge against them than simply debt, lingered for years and finally died of starvation in the debtor's prisons, and when a great estate once involved in a chancery suit was slowly but surely consumed in costs. We have changed all that; but much remains to be done not to enable litigants to repose on "flowery beds of ease," but to render the administration of justice swifter, surer, cheaper and more complete. Upon the last point we think our legislators have been most remiss. From the very simplest to the most complicated of litigation every lawsuit is a vexation, to one at least, if not to both parties. If a debtor, who can pay, will not pay, his creditor is forthwith saddled, as a penalty for his misplaced confidence, with a lawyer's fee of ten per cent. for collecting the debt, and to this loss is added the very serious inconvenience of not having his money when he needed and had a right to expect it, and the delay of payment protracted by useless imparlance terms, and probably fictitious and vexatious defenses, is often a source not only of inconvenience, but of positive and very serious loss. For this loss and inconvenience the law provides no remedy, except by statute in a few of the States, in which usually the remedy is grossly inadequate.

From this, the simplest and most common of the cases in which wrongs are inflicted and no remedy afforded, we ascend to the higher cases in which are involved personal character and reputation. The law of libel as usually administered fails utterly in most of the States to afford an adequate and appropriate relief in the cases to which it is applicable. To say nothing of the popular prejudice which prevails in many sections of the country against plaintiff in libel and slander suits, men "sueing for their character," to use the vulgar phrase, there is an incongruity between loss of reputation and recompense in money; and yet, although such recompense may be wholly inadequate to restore the original *status*, it constitutes the only remedy for the grievous offenses that the wisdom of lawgivers has been, in modern times, able to devise. Very seldom does any case occur in which a judgment for damages in a libel or slander suit is regarded by the plaintiff, his friends, or the public generally, as full compensation for the injury and suffering in-

flicted, and what is still worse it often happens that the judgment is a barren victory, that the defendent is writ proof, and the plaintiff has vindicated his character at his own expense. For this reason we think that the tendency in modern legislation to include libel and slander among indictable offenses is very commendable, and that the punishment inflicted for such offenses should be signal and exemplary.

We cannot see any good reason why verbal slander should not be regarded as a criminal offense as well as the libel which is written or printed. Words are but breath, and the spoken slander may be only *verbum volans*, while that which is written is more permanent *mansit litera scripta;* but nevertheless for all practical purposes, so far as the victim is concerned, the slander may be as permanent as the libel, for it may, and often does, last throughout his life-time. There should be, of course, a graduation of the two offenses, for the libel being written and printed implies premeditation and malice, while the slander may be merely an outburst of wrath uttered under strong provocation. This fact, however, should not reduce the offense to the grade of a mere civil injury, for which full reparation may be made in an action for damages. As well might a criminal court remit to civil jurisdiction an assault made under like provocation.

The imperfection of the remedy in cases of this character, especially in those injuriously affecting women, besides causing a great deal of unmerited suffering, is frequently the occasion of serious crimes, murder, manslaughter and violent assault.

The disposition to take the law into one's own hands is intensely stimulated whenever a flagrant injury is inflicted, for which the courts of justice can afford no adequate reparation, nor inflict upon the offenders the punishment which he deserves.

NOTES OF RECENT DECISIONS.

TRADE-MARK—DESCENT AND DISTRIBUTION—PARENT AND CHILD—INJUNCTION.—An interesting case[1] involving trade-mark law, and the transmission of that kind of property from father to son, and from son to grandson, was recently decided by the Supreme Court of Pennsylvania. The facts were that Jesse Darlington, as early as the year 1810, made a very superior article of butter, which he sold in large quantities. He adopted as a trade-mark, stamped upon each cake of butter, a cornucopia and his name, J. Darlington. In 1832 the business and the trade-mark descended to his son, Jared Darlington, and still later to his three grandsons, each of whom made the like style of butter and used the same trade-mark. Sebsequently to Jared Darlington's death, Pratt, the defendant, who was a neighbor of the Darlington family, adopted the cornucopia with his own name, "Pratt," as his trade-mark on his butter. The Darlingtons obtained an injunction, and Pratt appealed. The Supreme Court sustained their right to an injunction, and to the exclusive privilege of using a cornucopia as a trade-mark on butter. The court said, in effect, that if the use of another's trade-mark was calculated to mislead the public to the injury of the owner it is immaterial whether the injury was intentional or not.[2] The court added, that the use of a person's name could not be recognized as an appropriation of it in the capacity of trade-mark so as to preclude other persons who have the same name from making the same use of it. Nor can any word which usually designates the quality of an article be used as a trade-mark.[3] But when the plaintiffs had adopted the cornucopia as a trade-mark they acquired a property in it, of which no Darlington, nor any body else, could deprive them. The court adds: "The use of a spurious trade-mark is no defense to a bill for an injunction to prevent a piracy."[4] The court further held that Pratt's proposition was untenable: that upon the death of Jared Darlington (the son) the trade-mark ceased to be private property, and could not be claimed as such by the grandsons, the plaintiffs in this action. The court added, that as there was no fraud on the part of plaintiffs in claiming and using the trade-mark in question the case did not fall within the rule; that a court of equity

[1] Pratt's Appeal, S. C. Penn., Jan. 3, 1888; 25 Reporter, 171; 11 Atl. Rep. 878.

[2] Brown on Trade-marks, par. 449.

[3] Glendon, etc. Co. v. Uhler, 75 Pa. St. 467.

[4] Dixon Crucible Co. v. Guggenheim, 9 Phila. 416; Gillott v. Esterbrook, 37 Barb. 455; Boardman v. Meridan Brittania Co., — Conn. 402.

cannot and will not aid a party in perpetrating a fraud. The authorities fully sustain the proposition, that in the absence of fraud a trade-mark may not only descend to heirs, but be divided among them, each heir being entitled to use it exclusively as against all the world, except his co-heirs.[5] They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. In Kidd v. Johnson[6] it was said by Mr. Justice Field: "When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others the right to the use of the trade-mark may be lawfully transferred with it."[7]

5 Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523.

6 100 U. S. 617.

7 To the same point are Milling Co. v. Robinson, 20 Fed. Rep. 217; Southorn v. Reynolds, 12 L T. (N. S.) 75; Dent v. Turpin, 9 Weekly Reporter, 548. See also Dixon Crucible Co. v. Guggenheim, *supra*.

NUISANCE — MUNICIPAL CORPORATIONS — VILLAGE CORPORATION — PICNIC GROUNDS.— The Supreme Court of Illinois recently decided a case[1] of some interest to the pleasure-taking portion of the community. The facts were, that the village of Des Plaines, a municipal corporation organized under the general village law of Illinois, passed an ordinance declaring to be a nuisance any picnic grounds or place kept for open air dancing, or hired or let for that purpose, or other amusements, within the limits of the jurisdiction of the village, and imposing a penalty for the violation of the ordinance. Poyer was prosecuted under the ordinances and fined $100, and after a hearing in the appellate court the case came before the Supreme Court, which affirmed the decision of the appellate court declaring the invalidity of the ordinance. The Surpeme Court said: "The village is incorporated under the general law in relation to the incorporation of villages, and is, by that law, empowered to declare what shall be a nuisance; but this does not authorize the village to declare that a nuisance which is not so in fact.[2] It was said in Lakeview v. Letz:[3] 'There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character, in this respect, depending on circumstances.' And, in the latter instance, it is manifestly beyond the power of a village to declare, in advance, that those things are a nuisance; and so it was held in that case. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law. That public picnics and public dances are not, in their nature, nuisances, we think is quite clear. They are not in the list of common law nuisances enumerated in the text-books.[4] Now, is there anything necessarily harmful in the nature of either more than in that of any other public amusement? When conducted with proper decorum and circumspection, and remote from public thoroughfares, it is impossible to conceive how any public injury or annoyance can result. That the manner of conducting them may be productive of annoyance and injury to the public is not to be questioned; but since the nuisance must consist in this, and not in the picnic or dance, of itself alone the ordinance should be directed only to it. While the rights of the people to be free from disturbance and reasonable apprehension of danger to person and property is to be respected and jealously guarded, the equal rights of all to assemble together for health, recreation or amusement in the open air is not less to be respected and jealously guarded. Because a privilege may be abused is no reason why it shall be denied. We concur in the views expressed by the appellate court when the case was before it."[5]

1 Village of Des Plaines v Poyer, S. C. Ill., Jan. 19, 1888; 25 Reporter, 200; 14 N. E. Rep. 677.

2 Wood on Nuis., p. 809, § 740; Chicago v. Laflin, 49 Ill. 172; 1 Dillon on Mun. Corp. (3d ed.) § 374.

3 44 Ill. 81.

4 See 4 Bla. Com. (Sharswood's ed.) 166,* 167, *et seq.*; 1 Hawk. P. C. (Curwen's ed.) 694; Wood on Nuis., p. 35, § 23, *et seq.*

5 Poyer v. Village of Des Plaines, 22 Bradw.

CRIMINAL LAW—SUBORNATION OF PERJURY—WITNESS' KNOWLEDGE OF FALSEHOOD.—A case was recently decided in Illinois[1] defining the responsibility of a person accused of subornation of perjury. It is not necessary merely that the accused should know that the testimony which he was endeavoring to procure was false, but it is equally essential that the witness also should know it to be false, because unless the witness knew it to be false he could not be convicted of perjury in swearing to it; and, consequently, the suborner could not be convicted of inciting a person to commit the crime of perjury when he could not under the circumstances commit that crime. The court says: "To commit perjury a person must wilfully, corruptly and falsely swear or affirm to some material fact. The false assertion made by the witness under oath must be known to such witness to be false, and must be intended by him or her to mislead the court or jury.[2] The third instruction is erroneous, because it leaves out of view the element of corrupt intent on the part of the person incited. It in no way intimates that Mrs. Fleugel knew that what she was ask to swear to was false. The deed to her of the house and lot, and the deed to Coyne of the farm, were both absolute deeds upon their faces. The evidence tends to show that her own husband concurred in the statements made to her by Coyne as to what she was to say on the witness stand. If she believed that what she was asked to testify to was true, and did not know of its alleged falsity, then she would not have been guilty of perjury if she had sworn to it.[3] If plaintiff in error was trying to persuade Mrs. Fluegel that certain alleged facts were true, and to swear to them because of her belief that they were true, he was not endeavoring to incite her to commit perjury, even though he knew that the testimony he wanted her to give was false. It must appear that he was urging her to give false testimony, knowing that she, as well as himself, was aware of its falsity. 'Though a party who is charged with subornation of perjury knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.'[4] An instruction similar to the one now under consideration was, for the reason here indicted, decided to be erroneous by the Supreme Court of Massachusetts, in Commonwealth v. Douglass,[5] United States v. Dennee,[6] Stewart v. State."[7]

1 Coyne v. People, S. C. Ill., Jan. 19, 1888; 25 Reporter, 199; 14 N. E. Rep. 668.
2 2 Whart. Crim. Law (8th ed.), § 1244.
3 *Ibid.* §§ 1245, 1246.
4 *Ibid.* § 1329.
5 5 Metc. 241.
6 3 Wood, 39.
7 22 Ohio St. 477.

MINING ON PUBLIC LANDS.

When the army of adventurers first arrived at the gold fields of California, they found there was no law to govern them and no provision by which they could acquire title to the land, so they naturally established laws for themselves to meet all the necessities of their situation. Subsequently congress felt constrained to legislate in the matter, but they left much to be regulated by local law, and even by the rules and regulations of the miners in the several mining districts.[1]

So, in determining all matters of mining law as applied to the public lands we first consult the laws of the United States, then in subordination thereto the laws of the State or territory (in this article when State law is spoken of, territorial will be included), then in subordination to the latter, the rules and local customs of the mining districts. Since the whole country is now divided into organized governments, which have legislated on the subject, miners' rules and customs have fallen into innocuous desuetude and need not hereafter be regarded.

What are Mineral Lands.—The law requires that all lands valuable for minerals shall be reserved from sale.[2] Land so reserved by the secretary of the interior can only be sold under the law regulating the sale of mineral land.

Who can Occupy and Purchase Such Land.—All citizens of the United States, and those who have declared their intention to become such, can occupy and purchase it.[3] This includes unmarried women[4] and minors.[5]

1 Act of Congress, July 26, 1866.
2 Act of Congress, July 4, 1866.
3 Act of Congress, May 10, 1872.
4 Silver v. Ladd, 17 Wall. 219.
5 Thompson v. Spray (Cal.), 14 Pac. Rep. 182.

Since a corporation is a citizen of the State of its creation, the same privilege is extended to it.[6] It has been held that, though a location by an alien is not allowed, yet if he makes a location and conveys his interest to a citizen, who goes into possession, the title of the latter is good, provided no one has acquired prior rights.[7] No one is required to buy the ground from the government, but he is allowed so to do. This privilege is compared to a pre-emption right.[8] Owing to the fact that such occupant may extract and appropriate the ore, his interest has been said to be equivalent to a patent.[9]

Locating a Claim.—Any qualified person may go upon the unoccupied public mineral land, and upon finding thereon a mineral vein lode or ledge, may appropriate it to his own use. The most comprehensive definition of a mineral vein is any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock; or it is that formation by which the miners can be led or guided—whatever the miner can follow expecting to find ore in his lode.[10] The law enumerates some of the minerals,[11] and is held by the land office to include iron, fire-clay, borax, mica, umber and petroleum.[12] Since the land office is charged with issuing patents for such lands, its determinations upon all matters properly before it in so doing, such as whether the applicant has complied with the laws governing the question, are final and can only be reviewed by the courts in cases of fraud.[13] The land so appropriated in any location cannot exceed 1500 feet in length, nor be wider than 300 feet on each side of the centre of the vein. The boundaries must be distinctly marked on the ground, and the end lines must be parallel. The last provision is held only to be directory, and a departure therefrom does not vitiate the location.[14] The record of the location must identify it by reference to some natural object or permanent monument.[15] The State law here steps in and often reduces the size of the claim, and provides more explicitly for marking and for recording it. All the requirements of the law, except the parallelism of the end lines, must be complied with before a location is valid.[16] A vein of mineral must be found.[17] It has been held that such vein must be found in the discovery shaft.[18] Boundaries must be marked on the ground.[19] Recording the location certificate is also necessary.[20] Though the law refers to these various acts as coming in sequence, yet such sequence is not necessary, nor need the acts be done in the time limited, provided the acts are done before others have acquired any rights in the ground.[21] The location is valid only to the space allowed on each side of the vein. In the absence of proof to the contrary the land office presumes that the discovery shaft is over the centre of the vein.[22] The intention of the law was, that locations should be made along the vein, but, owing to the difficulty of ascertaining the course of a vein, this intention is often departed from, and certain consequences follow therefrom. Where a vein abandoned a location before reaching the end thereof, it was held that the location was defeasible, if not void, as to the ground beyond the abandonment, at least before a patent had been obtained.[23]

Locators are allowed to take the mineral in their vein in following it downward, though it may pass beyond their side lines extended vertically downward, but they cannot do so beyond their end lines. When the location is laid across the vein, the side lines become the end lines, and that privilege is denied;[24] nor is such privilege allowed when the end

[6] North N. M. Co. v. Orient M. Co., 6 Sawy. 299.
[7] North N. M. Co. v. Orient M. Co., *supra*.
[8] 420 Min. Co. v. Bullion Co., 3 Sawy. 634.
[9] Robertson v. Smith, 1 Mont. 410.
[10] Eureka C. M. Co. v. Richmond M. Co., 4 Sawy. 302; Iron S. M. Co. v. Cheesman, 116 U. S. 529; Gregory v. Pershbaker (Cal.), 14 Pac. Rep. 40.
[11] Rev. Stat. U. S., § 2320.
[12] Sickels' Min. L. & D., 401, 489, 490, 491.
[13] Smelting Co. v. Kemp, 104 U. S. 636; Johnson v. Towsley, 13 Wall. 72.
[14] Eureka M. Co. v. Richmond M .Co., 4 Sawy. 302; Horswell v. Ruiz, 67 Cal. 111.
[15] Rev. Stat. U. S., § 2324.
[16] Gonu v. Russell, 3 Mont. 358; Gleeson v. Martin W. M. Co., 13 Nev. 442.
[17] Van Zandt v. Argentine M. Co., 8 Fed. Rep. 725; McCaig v. Bryan (Colo.), 15 Pac. Rep. 413; North N. M. Co. v. Orient M. Co., 6 Sawy. 299.
[18] Van Zandt v. Argentine M. Co., *supra*; Zollars v. Evans, 5 Fed. Rep. 172.
[19] Gleeson v. Martin W. M. Co., *supra*.
[20] Gleeson v. Martin W. M. Co., *supra*.
[21] Faxon v. Barnard, 2 McCrary, 44; Croesus M. & M. Co. v. Colorado L. & M. Co., 19 Fed. Rep. 78; North N. M. Co. v. Orient M. Co., 6 Sawy. 299; Zollars v. Evans, *supra*.
[22] Sickels' Min. L. &. D. 40.
[23] Patterson v. Hitchcock, 3 Colo. 533.
[24] Mining Co. v. Tarbet, 98 U. S. 463; Argentine M. Co. v. Tenible M. Co., 122 U. S. 478.

lines are not parallel.[25] A location may be made by an agent,[26] and one, in whose name a location is made, is presumed *prima facie* to assent thereto.[27] No location made on ground already legally located is valid as to such ground.[28] If the discovery shaft is on such located ground, under the decisions already quoted the whole location is invalid. The old location must have first expired by abandonment or forfeiture, before the location can be made.[29] Some States allow a relocation in order to take in such abandoned land or to make any changes deemed necessary, and this is practically a new location, except that all rights obtained under the first location are retained.[30] When a person has held possession of a mining claim for the time limited by the statute of limitations, it is not necessary for him to show a good location: it will be presumed, and will defeat a subsequent location.[31] Questions as to the right of priority sometimes arise between parties who are seeking to make locations at the same time on the same piece of ground, and the decisions are conflicting. It has been decided that a location cannot be made by entering on land actually in the possession of another,[32] and that when a party is actually occupying and working a mining claim such possession extends to the whole claim, if his boundaries are plainly marked so that others can observe them,[33] but that if such boundaries are not marked, his possession extends only to the part actually used and occupied, in the absence of miners' regulations otherwise.[34] A party cannot forcibly intrude upon another in possession.[35] It is also held that the party in possession, steadily prosecuting work to find mineral, can keep others out of any portion of his marked claim;[36] but that if he allows others to enter, or if they do enter peaceably and make a valid location, they have the better title.[37] Again, it is held that possession is good against mere intruders, but not against those who have complied with the mining laws.[38] But it is held that such location cannot extend over ground in the actual possession of another under a senior discovery, though such party has failed to comply with the mining law.[39]

Preserving Title to Location.—To preserve his title to a location the locator is required to expend during every year, after the first day of January succeeding his location, $100 in developing the property.[40] Such work may consist of a house built thereon,[41] or in work done off of the claim, such as running a tunnel,[42] or building a road.[43] Though the boundaries are established, in order to notify others, yet if from any cause they are removed or obliterated without the fault of the locator, his location is not prejudiced thereby.[44] The location may be lost by voluntary abandonment, which is a question of fact to be proved, but mere absence or non-user alone for any time short of the statute of limitations does not show abandonment.[45] If, however, a locator resumes work in good faith for the purpose of doing his annual labor, before a second party has completed his relocation, he regains his title,[46] but he cannot forcibly intrude on the relocator in possession.[47] It has, however, been held that a relocator has the time allowed by statute to an original locator to finish his location after he has begun work, before the original locator can re-enter.[48]

[25] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196.

[26] Gore v. McBrayer, 18 Cal. 582; Murley v. Ennis, 2 Colo. 300.

[27] Van Valkenburg v. Huff, 1 Nev. 142.

[28] Little P. M. Co. v. Amie M. Co., 17 Fed. Rep. 57.

[29] Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331; Belk v. Meagher, 104 U. S. 279

[30] Gen. Stat. Colo., 724, § 2409; Dakota Codes (Levisee), 512, § 13.

[31] Harris v. Equator M. & M. Co., 3 McCrary, 14.

[32] Weese v. Barker, 7 Colo. 178; Lebanon M. Co. v. Republican M. Co., 6 Colo. 371.

[33] Hess v. Winder, 30 Cal. 349; North N. M. Co. v. Orient M. Co., 6 Sawy. 503.

[34] Hess v. Winder, *supra.*

[35] Atherton v. Fowler, 96 U. S. 513; Trenouth v. San Francisco, 100 U. S. 251.

[36] Crossman v. Pendery, 8 Fed. Rep. 693.

[37] Crossman v. Pendery, *supra;* Horswell v. Ruiz, 4 Mont. 550.

[38] Golden Fleece Co. v. Cable Co., 12 Nev. 321; Du Prat v. James, 65 Cal. 556; Hopkins v. Noyes, 4 Mont. 550; Garthe v. Hart (Cal.), 15 Pac. Rep. 93.

[39] Faxon v. Bernard, *supra.*

[40] Rev. Stat. U. S., § 2324, as amended January 22, 1880.

[41] McCaig v. Bryan (Colo.), 15 Pac. Rep. 413.

[42] Rev. Stat. U. S., § 2324.

[43] Mount Diablo M. & M. Co. v. Callison, 5 Sawy. 439.

[44] Jupiter M. Co. v. Bodie C. M. Co., 11 Fed. Rep. 666.

[45] Mallett v. Uncle Sam M. Co., 1 Nev. 188.

[46] Smelting Co. v. Kemp, 104 U. S. 636; Gonu v. Russell, 3 Mont. 363; Graydon v. Hood, Mor. Min. R. (5th ed.) 57; Lakin v. Sierra Butte G. M. Co., 25 Fed. Rep. 337.

[47] Slavonian M. Co. v. Perasich, 7 Fed. Rep. 331; Belk v. Meagher, 104 U. S. 279.

[48] Little G. Co. v. Kimber, Mor. Min. R. (5th ed.) 57.

Examining Title to Location.—To determine the validity of a location, when a transfer is proposed, a great many steps must be taken. The records must be examined to see whether the location certificate is properly made and recorded, and what transfers are in existence. Then it must be ascertained what liens, or suits, or judgments in the State or Federal courts exist. This completes the examination of records. Each location certificate is made entirely independent of every other, and it identifies the lode generally by the angle some point thereon bears to distant mountain peaks, which points of identification may be entirely different in a conflicting claim. Again, the rough calculations of miners are not reliable, and are generally supplemented by a correct survey prior to patent, since they are usually erroneous, and the courts therefore treat them as leniently as the law will allow. So the ground must be examined and all the parties in the neighborhood questioned, to learn whether the location conforms in all respects to the requirements of the law, as to finding mineral, staking, posting notices, etc., and to ascertain if any other locations conflict with this. For this purpose every hole within 1,500 feet of the claim must be examined and its history ascertained to see whether it was a valid location; whether it conflicted, and in case of conflict, which location has now the better title. Then it is well to examine the land-office records, or a mineral surveyor's maps, to see if a patent or placer lode has been obtained on the ground. Even then one is not certain, for the elements often obliterate discovery shafts or tunnels, while the annual work may be done on another claim. The locator with a good title will never interfere with development work done by another till rich mineral is obtained, or some action is necessary to protect his own title. The only way to bring the matter to an issue, and to settle all questions, is to apply for a patent to the land.

Obtaining a Patent.—The law prescribes the mode of obtaining a patent,[49] and it suffices to say that $500 must be expended in developing the claim, the notice of application must be posted on the ground and in the land-office for sixty days, and advertised for the same period. Those claiming adverse interests must file their claim in the land-office during that time, or be for ever barred. The proceeding is of the nature of an action *in rem*.[50] If they fail to do so, they can, as *amici curiæ*, protest against the issuance of the patent;[51] but such protests are seldom efficacious. If the adverse claim is filed, a suit to determine the question must be brought within thirty days, its result is certified to the land-office, the applicant pays for the ground he is entitled to under the judgment, and in due time he obtains his patent. The jury can find that neither applicant is entitled to the land.[52] The patent relates back to the inception of the title, the original location.[53] After the money is paid, it is no longer necessary to do any work on the mine.[54] Certain easements are reserved by law in the patent for the convenience of developing other mines, but all reservations therein not authorized by law are void.[55] If the patent is void because the land-office had no jurisdiction to issue it, as, for instance, the land was reserved from sale, or had been already disposed of, it may be attacked collaterally.[56] One who can connect himself with the original source of title, so that he can aver that his rights are injuriously affected by the patent, and has such equities as will control the legal title in the hands of the patentee, may sue in equity to have the patent subjected to his rights.[57] For any other fraud only the United States can sue to set aside a patent, and it is a difficult matter to induce such action. Any number of contiguous lode claims or placers may be united in one application for a patent.[58] The land-office holds that annual labor must be done while adverse litigation is pending.[59]

Mill Sites.—An applicant for a lode patent may join thereto an application for a patent for not more than five acres of land for a mill

[49] Rev. Stat. U. S., § 2325.

[50] Rev. Stat. U. S., § 2325; Talbot v. King, 6 Mont. 76; 420 Min. Co. v. Bullion Co., 3 Sawy. 634.

[51] Wight v. Dubois, 21 Fed. Rep. 613.

[52] Act of Congress, March 3, 1881.

[53] Stark v. Storrs, 6 Wall. 402; Talbot v. King, *supra*.

[54] Deffebach v. Hawke, 115 U. S. 405; Alta M. & S. Co. v. Benson M. & S. Co. (Ariz.), 16 Pac. Rep. 565.

[55] Butte City Smoke House Lode Cases, 6 Mont. 397; Talbot v. King, *supra*.

[56] Morton v. Nebraska, 21 Wall. 660; Smelting Co. v. Kemp, 104 U. S. 636.

[57] Smelting Co. v. Kemp, 104 U. S. 636; Kahn v. Old T. M. Co., 2 Utah, 174.

[58] Smelting Co. v. Kemp, *supra*.

[59] Sickels' Min. L. & D. 371.

site. Said land must be non-mineral, and not contiguous to his lode.[60]

Placers.—A placer is all mineral land, which does not fall under the definition of a vein.[61] Each person can locate twenty acres, or eight persons, jointly, one hundred and sixty acres. Lodes known to exist on a placer at the time of the application for a patent thereon are not conveyed by the patent. Otherwise the laws relating to placers and to lodes are substantially alike.[62]

Tunnel Claims.—A tunnel may be located but not patented, and work thereon must be prosecuted with due diligence, or all rights thereunder will be lost. The owner thereof is entitled to all lodes discovered therein while running three thousand feet, which lodes were not before known to exist, to the same extent as though discovered from the surface, and other parties are forbidden to locate on the line of such tunnel lodes not appearing on the surface, after the commencent of the tunnel and while it is being prosecuted with due diligence.[63] State laws provide for marking and recording such tunnel claim.

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[60] Rev. Stat. U. S., § 2337.
[61] Gregory v. Pershbaker, *supra*.
[62] Rev. Stat. U. S., §§ 2329, 2330, 2331.
[63] Rev. Stat. U. S., § 2323.

STATUTE OF FRAUDS—ORIGINAL AND COLLATERAL PROMISES.

RINTOUL V. WHITE.

Court of Appeals of New York, January 17, 1888.

Where the primary debt subsists and was antecedently contracted, the promise of a third party to pay it is original and outside of the statute of frauds, when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor.

James White brought this action against James Rintoul, to recover the amount of two notes made by the firm of Wheatcroft & Rintoul, of which firm defendant was not a member, on an alleged promise of defendant to pay the same, made after the making of the notes, on August 16, 1880. The notes were made, one June 1, 1880, at three months, due September 4, 1880; and the other, July 1, 1880, also at three months, due October 4, 1880. The consideration alleged in the complaint is forbearance to the original promisor "before July 1, 1881." Judgment for plaintiff, and defendant's motion for a new trial overruled. Defendant appeals.

FINCH, J., delivered the opinion of the court:

The doctrine prevailing in this State, which serves to distinguish between original and collateral promises in cases arising under the statute of frauds, has been reached in three stages. Each was a definite and deliberate advance towards a more faithful observance of the statute, and an abandonment of efforts to narrow the just and natural range of its application. When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original, although that debt subsisted, and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity which, perhaps, will never be entirely dissipated. The argument in the present case has so reached back to the foundations of the controversy, and challenged or construed what has been said and ruled, as to make both useful and necessary a study of the path which the courts of this State have followed.

The plaintiff has recovered upon a verbal promise to pay the debt of another, and seeks to maintain his position in part upon the definition of an original promise framed in the old and familiar case of Leonard v. Vredenburgh, 8 Johns. 29. That definition assumed, as the test of an original promise, that it was founded on a new or further consideration of benefit or harm moving between the promisor and promisee. There was found in this some inaccuracy of expression, for, since every promise must have some consideration, to be valid at common law, and that necessary and inevitable consideration, wherever the debt to be paid antecedently existed, is always "new" and "further," because different from that of the primary debt, and since, also, such new consideration does frequently move between the newly-contracting parties, giving benefit to promisor or harm to promisee, it became apparent that the terms of the definition were dangerously broad, and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties was good, also, in spite of the statute. This difficulty was disclosed and measured, and then remedied, in Mallory v. Gillett, 21 N. Y. 412, by a divided court, it is true, but upon a prevailing opinion so strong in its reasoning, and so clear in its analysis, as to have commanded very general approval. The case was one where, in reliance on the promise made, the promisee had released to his debtor a lien which gave his debt protection. Within the

language of the rule in Leonard v. Vredenburgh, the promise was original, and not within the statute, since the consideration which supported it was "new" and "further," and passed between the newly-contracting parties, and consisted in the harm to the promisee involved in the surrender of his lien. But the promise was, nevertheless, held to be collateral, and the earlier definition modified so as to require that the new consideration should move to the promisor, and be beneficial to him. This change shut out at once from the class of original promises all those in which the consideration of the promise was harm to the promisee, and the resultant benefit moved to the debtor, instead of the promisor. The ground of the doctrine thus asserted was explained by the test then prevailing in Massachusetts, declaring the promise original where its leading and chief object is to subserve or promote some interest or purpose of the promisor himself, and upon which the respondent very much relies. Nelson v. Boynton, 3 Metc. 396. That this expression was understood to mean not merely some moral or sentimental object, but to relate to a legal interest or purpose tangible by the law, and a product of the consideration received from creditor or debtor, is apparent from the further current of the explanation. The learned judge contrasts a case in which the consideration benefits the debtor, but in it the promisor has no personal interest or concern, with one in which the consideration is the product of some new dealing between creditor or debtor and the promisor, and in which the latter has a personal interest. That is what he means by a consideration of benefit moving to the promisor, and to obtain which is the object of the promise.

But the rule thus stated and explained was again narrowed and restricted. In Brown v. Weber, 38 N. Y. 187, it was asserted that a promise might still be collateral even though the new consideration moved to the promisor, and was beneficial to him. It was distinctly said that the existence of those facts would not, in every case, stamp the promise as original, but the inquiry would remain whether such promise was independent of the original debt or contingent upon it. The court added: "The test to be applied to every case is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of another third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety for the performance by some other person of the obligation of the latter to the creditor." If this statement was not needed for a determination of the case, or the generality of its language left it debatable, what precise limitation or qualification was intended to be added to the rule of Mallory v. Gillett, both difficulties were removed by the recent case of Ackley v. Parmenter, 98 N. Y. 425, in which Rapallo, J., states with precision and accuracy the doctrine of the court. The debt there was the debt of one Sullivan, and the verbal undertakings were held to be within the statute, unless the defendant, before making the promise, had so dealt as to make Sullivan's debt his own, or had incurred a duty to pay the amount owing from Sullivan to the plaintiff. It was added, relatively to one possible view of the facts, that the plaintiff's undertaking was to pay out of the proceeds of the stock, and his duty to pay would not arise until he had converted the stock into money. "Consequently," it was concluded, "at the time of the alleged promise, he was under no present duty to pay, and the promise, though founded on a good consideration (viz.: the adjournment of the sale), was nevertheless an undertaking to pay the debt of another."

These four cases, advancing by three distinct stages in a common direction, have ended in establishing a doctrine in the courts of this State which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. The question in the present case was raised in three ways. At the first effort to prove a verbal promise to pay the debt due plaintiff, the objection was made to the evidence, that if any promise was to be proved it must be in writing. The objection was overruled and an exception was taken. After the conversation had been stated, which culminated in a promise, the defendant moved to strike out that part of the answer which detailed the verbal promise. That motion was denied, and the defendant again excepted. At the close of the plaintiff's case there was a motion for a non-suit, upon the ground that the promise was not in writing, and was therefore within the statute of frauds; and also upon the ground that there was no evidence that the promise was for the promisor's special benefit. The motion was denied, and again an exception was taken. Finally, at the close of the evidence, the court was asked to direct a verdict for the defendant, which was refused, and the defendant excepted. I do not think that any of these exceptions were waived by the defendant's subsequent requests to charge. The case went to the jury, against his objection, and upon a theory to which he in no manner assented; but, even upon that theory, to which the court drove him, he had a right to claim that he was not liable, and ask a charge which might give him protection, without at all waiving his position upon the law. We are, therefore, to bring the facts of the case to the test of the rule above stated, and in doing so we are to take them from defendant's own lips—to treat as true his representations as detailed by his adversary, and to draw from the evidence every possible inference which is favorable to the plaintiff's case.

The firm of Wheatcroft & Rintoul, of which de-

fendant was not a member, became indebted to the plaintiff in the amount of two notes—one dated June 1, 1880, and maturing September 4, 1880; and the other dated July 1, 1880, and to become due October 4, 1880. On the 16th of August, 1880, and so before the maturity of either note, the defendant requested the plaintiff to forbear any effort at their collection until June or July, 1881, promising, if the plaintiff would do so, to pay the amount of the notes. The plaintiff did forbear, and now sues upon the promise. The courts have held many times that a promise upon consideration of forbearance to sue the debtor is not original, and, to be valid, must be in writing. In Ackley v. Parmenter, *supra*, it was said: "Forbearance or indulgence to the debtor, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt." If there were nothing more of the case than has been thus far stated, it would be very clear that the plaintiff ought to have been nonsuited. But there are further facts upon which it was found that the sole object of the defendant was to subserve some purpose of his own. I do not recognize that as either a test or a rule. "Some purpose" might mean one of morals or sentiment, of gratitude or pride, and to subserve such purpose might be the sole object of the promise, and then, by submitting the question to the jury, it would be easy in every case to defeat and evade the statute. But neither the court below nor the plaintiff's counsel meant so loose a doctrine. What they did mean was that on the facts it was possible to say that the forbearance of the plaintiff to sue was not merely a benefit to Wheatcroft & Rintoul, but that defendant was so situated relatively to that firm that the plaintiff's delay was a benefit to the defendant personally, which he contracted for in his own interest, and obtained by means of his promise.

One member of the debtor firm was the defendant's son, and that firm was somewhat in debt, and not managing the business successfully or satisfactorily. The defendant was a creditor of the firm. He had loaned to them something over $5,000, for which he held as security a chattel mortgage on the fixtures and machinery of the firm. He was, therefore, to some extent, at least, a secured creditor. He represented to plaintiff that he had advanced all the money for the business of the firm; that he was determined to get rid of his son's partner, who was drawing money that was his money; that the business was not paying, and he wanted to give it up, or he was going to conduct it alone or through his son; that if plaintiff tried to collect his debt he would not be able to get anything; that there was a chattel mortgage against the property; that he had furnished money himself, for which he had a mortgage, or would get one, and plaintiff could not get anything; that the only way and the best way would be to give the firm time; that it was late in the season, and, by waiting until the next summer, they could sell their beer, and that he would pay plaintiff for the two notes. That is plaintiff's account of the conversation, given on his direct-examination. On his cross-examination he added that defendant said he had a claim or a confession or a mortgage or some security for the amount of money due him, and that plaintiff could not get anything anyway, and that the money that was due defendant was the first to be paid out of the firm. Upon the basis of this evidence, the plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying, "that if plaintiff pressed the collection of the notes, and did not wait till the then next summer, defendant would lose his money" which had been loaned to the firm. But I do not discover a single fact in the case which tends to any such conclusion. I have not overlooked the proof that the plaintiff, while saying nothing of the sort in his first detail of defendant's words, did later add that defendant declared he would lose his money if plaintiff forced a collection. But this was merely an expression of an opinion or fear, not only without anything to justify it, but in direct contradiction of every fact bearing upon the situation, and indicating defendant's relations with the firm. It was a fear without a foundation; a state of mind, and not a result of existing facts, seen in their legal bearing. The defendant was a secured creditor of the firm. Delay on the part of plaintiff is not shown to have been of the slightest consequence to the interest of defendant. It is not pretended that his security was inadequate. Beyond that he asserted that he was to be first paid, and that plaintiff could get nothing if he sued. When the conversation took place the first note had not matured, and could not be sued under about a fortnight. It is not suggested or shown that defendant's claim was not due, and there was ample time, if further security was needed, to sue and levy in advance of plaintiff. That delay by the latter was in the slightest degree material to the safety of defendant's debt is a purely gratuitous assumption. The evidence is all to the exact contrary. The motive disclosed was regard for his son and desire that his business credit should not be damaged by a failure. The purpose for which he sought delay was wholly in the interest of that son, and to enable him to market his beer the next summer, and so procure the means to pay the plaintiff without sacrifice or discredit. The debt of the firm was in no sense defendant's debt. No consideration of benefit moved to him from either party, and least of all had there been any new dealing with either which put upon him a duty of payment. Before the promise was made he owed no such duty, and came under no such obligation. The doctrine of this court clearly stamps the promise as collateral and void for want of a writing. Indeed, the proof shows that the plaintiff himself did not mistake its character. On the 1st of September, 1880, he says defendant called to get his signature to a paper which recited the ownership by defendant of a chattel mortgage on property of Wheatcroft

& Rintoul, and although he signed it he testified: "My remark that I did not want to sign the paper was caused by my surprise that the man should ask me to sign that paper when he had just guaranteed my debt." Wheatcroft was present at that interview, and, called as a witness for plaintiff, testified that he thought defendant said to plaintiff, "I have already promised to see you paid," and added that the words were distinctly impressed upon his memory. John Flintoff was also present at that conversation, and was called by plaintiff, relating its language thus: "'But,' said Mr. White, 'you said you would see me paid,' and Mr. Rintoul assented to the proposition; he said, 'for the matter of that, I said I will see you paid.'" So that not only do facts appear which make defendant's safety depend upon plaintiff's forbearance, but the very promise itself by the plaintiff's own admission and the recital of his witnesses, was a guaranty of the firm's debt, and contingent upon non-payment by them. The case is one in which a faithful observance of the statute of frauds requires us to say that the promise sued on is void for want of a writing.

The judgment should be reversed and a new trial granted, costs to abide event.

NOTE.—The numerous decisions interpreting the statute of frauds show how impossible it is to frame a statute, whose application to any case arising will never be ambiguous. It was held in 1796, that the parol promise of A to indemnify B in case of loss, if he should become a surety for C, was within this statute.[1] This was reversed in 1828.[2] In 1839 the first view was re-adopted.[3] In 1862 the English courts concluded that such promise did not come under the statute,[4] and that is the view still held there.

The weight of the authorities is, that a parol promise to pay the debt or default of another, is not within the statute under the following circumstances, viz:

1. When there is no original debt, as when one agrees to be a guarantor to another for a third person, upon the promisee agreeing to indemnify him.[5] When the third person cannot be made liable legally, as for instance, if he be a minor, the same rule applies.[6] The same view has sometimes been held relative to a promise to indemnify a surety on a bail bond, on the ground that the party bailed is under no obligation to refund to the signers of his bail bond any losses they sustain by his action.[7]

2. When the old debt is extinguished and the promise is substituted in its place.[8]

3. Where, though the debt remains, the promise is founded upon a consideration, which moves to the promisor.[9] It is not enough that a benefit may incidentally result to the promisor; such benefit must be the object of and consideration for his promise.[10]

When the promisor holds property in his hands belonging to the debtor, which it is his duty to apply to the payment of the debt, it is held, that his parol promise to pay the debt attaches upon his obligation or duty, growing out of the receipt of such funds, and is binding on him.[11] Of a similar nature is the assumption by A, of a debt due from B to C, as part of the consideration to be paid by A to B under a contract.[12]

But often promises to pay for articles furnished to another, are original promises and not the assumption of the liabilities of others. An original undertaking to pay for goods to be delivered to another, or services to be performed for another, is binding, though not in writing.[13] A material man refused to furnish a contractor further on credit, when A, who had made loans to the contractor and whose repayment depended upon the completion of the work, promised to see that the material man should be paid for further supplies. It was held, that A was liable on his parol contract, and that the substance of the contract would prevail over its form.[14] Contractors were bound by an oral promise to a boarding house keeper to see him paid for board to be furnished to the laborers of one of their sub-contractors.[15] A parol order by a contractor to furnish goods to a subcontractor, and to charge them to the latter, but to bring the bill to the former who would pay it, is binding.[16] But when goods are delivered to one on the promise of another to pay for them, the latter is not bound, if at the delivery any credit was given to the former.[17] A promise to pay for medical services to be bestowed on his laborers, is merely a promise to pay his own debt in a particular way.[18]

The American decisions have been as conflicting as the English on the question of the validity of the parol promise of A, to hold B harmless if he should become a surety for C.[19] Forbearance to collect a debt from one on the promise of another to pay it, is a collateral undertaking.[20]

1 Winchworth v. Mills, 2 Esp. 484.

2 Thomas v. Cook, 8 B. & C. 728.

3 Green v. Creswell, 10 A. & E. 453.

4 Raeder v. Kingham, 13 C. B. 344.

5 Mallory v. Gillett, 21 N. Y. 412; Green v. Brookins, 23 Mich. 48.

6 Chapin v. Lapham, 20 Pick. 467; Mease v. Wagner, 1 McCord, 395; Roche v. Chaplin, 1 Bailey, 419; Marcy v. Crawford, 16 Conn. 549.

7 Cripps v. Hartwell, 4 B. & S. 414.

8 Langford v. Freeman, 60 Ind. 47; Dranghan v. Bunting, 9 Ired. 10; Mulcrone v. American L. Co., 55 Mich. 622; Holm v. Sandberg, 32 Minn. 427; Fullam v. Adams, 37 Vt. 391; Kingsley v. Balcome, 4 Barb. 131; Simpson v. Nance, Spears, 4.

9 Reed v. Holcomb, 31 Conn. 360; Wilson v. Hentges, 29 Minn. 102; Lang v. Henry, 54 N. H. 57; Furbish v. Goodnow, 98 Mass. 296; Jepherson v. Hunt, 2 Allen, 417.

10 Morrisey v. Kinsey, 16 Neb. 17; Clapp v. Webb, 13 Cent. L. J. 314; Nugent v. Wolfe, 111 Pa. St. 471; Lookout Mt. R. Co. v. Houston (Tenn.), 2 S. W. Rep. 36; Furbish v. Goodnow, *supra;* Crawford v. Edison (Ohio), 13 N. E. Rep. 80.

11 Fullam v. Adams, 37 Vt. 391; Crosby v. Jerolman, 37 Ind. 264.

12 Clay v. Tyson, 19 Neb. 530; Poole v. Hintrager, 60 Iowa, 180; Stariha v. Greenwood, 23 Minn. 521; Sonstiby v. Keeley, 7 Fed. Rep. 447.

13 DeWitt v. Root, 18 Neb. 567; Hake v. Solomon (Mich.), 28 N. W. Rep. 908.

14 Green v. Burton, 59 Vt. 423.

15 Grant v. Wolf, 34 Minn. 32.

16 Maurin v. Fogelberg (Minn.), 32 N. W. Rep. 858.

17 Cole v. Hutchinson, 34 Minn. 410; Langdon v. Richardson, 58 Iowa, 610.

18 Woodruff v Scaife (Ala.), 3 South. Rep. 311.

19 Contract is binding: Holmes v. Knights, 10 N. H. 175; Anderson v. Spence (Ind.), 12 Cent. L. J. 562; Vogel v. Melms, 31 Wis. 306; Jones v. Shorter, 1 Kelly, 294; Jones v. Letcher, 13 B. Mon. 363; Wildes v. Dudlow, 2 Cent. L. J. 317. *Contra:* Nugent v. Wolfe, 111 Pa. St. 471; Easter v. White, 12 Ohio St. 219; Bessig v. Britton (Mo.), 12 Cent. L. J. 297; Kingsley v. Balcombe, 4 Barb. 131; Aldrich v. Ames, 9 Gray, 76; Dranghan v. Bunting, 9 Ired. 10; Brown v. Adams, 1 Stew. 51.

20 Lang v. Henry, 54 N. H. 57. *Contra:* Bowen v. Tipton, 64 Md. 275.

FIXTURES—WHEN PERSONALTY BECOMES A PART OF THE REALTY—INTENTION OF THE PARTIES MAKING THE ANNEXATION.

WALKER V. GRAND RAPIDS FLOURING MILL COMPANY.

Supreme Court of Wisconsin, November 22, 1887.

The defendants were a corporation and the owners of a flouring mill. A agreed for a certain consideration to repair the mill and put in new machinery. The plaintiffs sent a machine to A, consigned to themselves and in the care of another to have it tested. The machine was attached to the floor with screws and to the main shafting of the mill with belts and pulleys. Defendants had notice of the ownership and never paid anything for the property. Plaintiffs never sold or contracted to sell it to any one, and demanded of defendants its return, which was refused: *Held*,

1. That, as between the owner and purchaser, the machine did not become a fixture.

2. That plaintiffs were not estopped to recover for its conversion, by reason of having so intrusted it to another.

This is an action in the nature of trover, brought by the plaintiffs, who were copartners, to recover the value of a machine known and described as a "Pomeroy First Reduction Roller Mill," which it is alleged the defendant unlawfully converted to its own use. The answer admits that the plaintiffs were copartners, and that the defendant is a corporation, as stated in the complaint. The cause was tried by the court without a jury. The facts are substantially as follows: The firm of Neeves & Podawitz was the owner of a flouring mill at Grand Rapids. In April, 1883, this firm entered into a contract with one Pomeroy, in and by which, for a consideration therein named, Pomeroy agreed to change and convert the flouring mill of the firm into a first-class mill, with a specified capacity to manufacture flour, and to that end to put in said mill a large quantity of machinery, particularly specified in the contract, among which was "one first-break Pomeroy machine," which is the same machine, under a different name, described in the complaint. The plaintiff had just commenced the manufacture of that machine at Madison, Wis., and sent one of the machines to Grand Rapids, consigned to themselves, in the care of Pomeroy. The testimony on the part of the plaintiffs is that they so sent the machine for the purpose of having it tested by Pomeroy in the mill of Neeves & Podawitz. Pomeroy put the machine in position for use. It stood on four legs, and was attached by screws to the floor, and connected by belts and pulleys to the main shafting, by which the machinery in the mill was operated. That about three weeks after such consignment, Mr. Ball, one of the plaintiffs, went to Grand Rapids, and had an interview with Neeves in relation to the machine, informing him of the purpose for which it sent, and that the same had not been sold to Pomeroy. The parties came to no understanding about the machine—Neeves insisting that he had purchased it of Pomeroy; Mr. Ball insisting that the machine was the property of the plaintiffs. After another and later interview between two of the plaintiffs, Mr. Ball and Mr. Main, with Mr. Neeves, which led to no results, the plaintiffs made a formal demand for the machine, and, the same not being delivered to them, they brought this action to recover its value. It should be stated that, soon after the first interview between Ball and Neeves, the defendant corporation was organized, and the mill and its appurtenances were conveyed to it by Neeves & Podawitz. Neeves was the secretary and manager of the business of the corporation. The court found as facts that, at the time of such demand, the plaintiffs were, and ever since have been, and now are, the lawful owners of the machine in controversy, and entitled to the possession thereof, and that ever since that time the defendant wrongfully converted the same to its own use, and detained it from the plaintiffs. The court also assessed the plaintiffs' damages at $231.32, and gave them judgment against the defendant therefor, with costs. The defendant appeals from the judgment.

LYON, J., delivered the opinion of the court:

The evidence is undisputed that the plaintiffs never sold or contracted to sell the machine in controversy to Pomeroy, or any one else. It is claimed, however, on behalf of the defendant, that because they intrusted the machine to Pomeroy, and he placed it in the mill of Neeves & Podawitz under a contract to put such a machine in their mill, and because that firm had no notice or knowledge, until it was so placed, that Pomeroy was not the owner of it, the plaintiffs should be estopped to claim the machine as their own property. Were it true that Neeves & Podawitz, before they had notice that Pomeroy was not the owner of the machine, and believing him to be the owner, had paid him therefore, or had they done any other act to their prejudice on the faith that Pomeroy was such owner, there would be great force in the claim thus made on behalf of the defendant. But such is not the case. When the machine was shipped to Grand Rapids it was consigned to the plaintiffs, and the firm knew that fact. This, of itself, was a circumstance which might well put the firm upon inquiry as to who was such owner. More than this, there is no testimony whatever tending to show that the firm ever paid Pomeroy any money, or did any act whatever, or in any manner changed their position on the faith that Pomeroy owned the machine, before they were notified to the contrary. It may be observed here that the testimony on this question of notice was conflicting; but manifestly the court found that such notice was given, as testified to by Mr. Ball. Notice to Neeves operates as notice to the defendant corporation, whose affairs were managed by Neeves from its organization, and of which he was an officer. We conclude, therefore, that the plaintiffs are the owners

of the machine, and may recover its value in this action, unless some disposition has been made thereof which will defeat them. The principal ground upon which it is claimed that such a disposition has been made is, that it has been so annexed to the mill as to become a permanent fixture, and therefore part and parcel of the freehold.

In Taylor v. Collins, 51 Wis. 123, 18 N. W. Rep. 22, Mr. Justice Orton lays down the following rules or tests for determining whether articles of machinery are fixtures: "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the annexation to make permanent accession to the freehold." In the present case, the requirement of the third rule is entirely wanting. The machine was not furnished to Pomeroy by the plaintiffs to be made a permanent accession to the freehold, unless some person interested should thereafter purchase it, and there is no evidence that Pomeroy had any such intention. He had no right to make the same a permanent accession to the freehold, and the legal presumption is that he did not. The fact that it was attached in the manner above stated to the building and freehold is not significant. It was not so incorporated with the building as to lose its identity, or to render it difficult or injurious to the building to remove it.

In the case of Bank v. O. E. Merrill Co., 34 N. W. Rep. 514, it was held that a large amount of machinery in a foundry building, indeed, all the machinery therein over and beyond the waterwheel, much of which was attached to the building more extensively and firmly than was the machine in controversy here, were not permanent fixtures, but personal property, which the tenant who placed the machinery there had a right to remove. This case illustrates of how little importance the mere fact of attachment to the freehold is, so long as the identity of the property remains, and its capacity to be removed and used elsewhere. The principal consideration in such cases is the intention of the party putting in the machinery.

Counsel for the defendant greatly rely upon the case of Iron Works v. Adams, 37 Conn. 233. An examination of that case shows that it was decided upon the ground that the property in controversy was so attached to the building as to lose its identity. The same is true of the case of Fryatt v. Sullivan Co., 5 Hill, 116, affirmed by the court of errors, 7 Hill, 529, also relied upon by counsel for defendant. The principle of these cases will apply where boards, timber, brick or stone are incorporated in a building. They necessarily become a part of the building, and thus lose their identity as personal property. It should be observed that in both the above cases the owners of the freehold had paid their vendor or contractor for the articles thus made fixtures in good faith, and without notice that such articles belonged to other parties.

The case of Railway Co. v. Busch, 43 Mich. 571, 6 N. W. Rep. 90, as well as many other cases cited to the same proposition, belongs to this class. In the latter case it was held that ties used in the building of a railroad thereby lost their identity as personal property, and an action for their conversion could not lie. Other cases are cited on behalf of the defendant, in which the judgments were controlled by the consideration that the owners of the buildings in which the machinery in controversy had been placed by contractors, had paid therefor in good faith, believing that such contractors owned the machinery, when, in fact, they did not. We have already seen that this is not such a case.

The foregoing considerations lead us to the conclusion that the machinery in question in this case remained the personal property of the plaintiffs, and that they are entitled to recover therefor, in this action. The judgment of the circuit court is affirmed.

NOTE.—It is a well settled doctrine that, as a general rule, some degree of actual annexation or fixation is necessary to constitute a fixture.[1] A heater placed in a vat in a tannery by a conditional vendee of land, the vat being detached from the building, except that a small piece of board was tacked to the vat and the side of the building, but which fastening was unnecessary and of no use, except to keep the side standing while the vat was being put together, is a mere chattel; and it seems that such would be the case even if placed therein by the owner of the freehold.[2] In Michigan, it is held that the most important test in determining whether machinery affixed to a building is personalty or a part of the realty, is the intention of the parties making the annexation.[3]

In McLaughlin v. Nash,[4] it was held that a trip hammer firmly attached to a block set in the ground, the blower of the forge set on the floor and fastened by bolts, and a force pump fastened by screws to the side

[1] Laflin v. Griffiths, 35 Barb. 58, 62; Potter v. Crommuree, 40 N. Y. (1 Hand) 287, 295; Voorhees v. McGinnis, 48 N. Y. 278, 282; Hoyle v. Pattsburgh, etc. R. Co., 54 N. Y. 314, 323; Vanderpool v. Van Allen, 10 Barb. 157, 162; Stevens v. Buffalo, etc. R. Co., 31 Barb. 590; Beardsley v. Ontario Bank, 31 Barb. 619, 634; Noyes v. Terry, 1 Lans. 219, 220; Tairis v. Walker, 1 Bail. 540; Lothrop v. Blake, 23 N. H. 46, 66; Despatch Line of Packets v. Bellamy, etc. Co., 12 N. H. 205, 234; Brown v. Lillie, 6 Nev. 244; Merritt v. Judd, 14 Cal. 59, 64; Pennybacker v. McDougal, 48 Cal. 160; Baldwin v. Breed, 16 Conn. 60, 66; Capen v. Peckham, 35 Conn. 88, 93; Stockwell v. Campbell, 34 Conn. 362; Potts v. New Jersey Arms Co., 17 N. J. Eq. 395; Quinby v. Manhattan Cloth Co., 24 N. J. Eq. 260; Teaff v. Hewitt, 1 Ohio, 511; Shoemaker v. Simpson, 3 Cent. L. J. 132.

[2] Raymond v. White, 7 Cow. 319.

[3] Manwaring v. Jenison, 27 N. W. Rep. 286; Vehue v. Mosher, 22 Cent. L. J. 378; Thomas v. Davis, 15 Cent. L. J. 489.

[4] 14 Allen, 136; *Re* Amslie, Swinburn v. Amslie, 22 Cent. L. J. 378; Hemenway v. Cutter, 51 Me. 407; Poor v. Oakman, 104 Mass. 309; Oakman v. Dorchester Ins. Co., 98 Mass. 57; King v. Johnson, 7 Gray, 239; Milton v. Colby, 5 Met. 78; Eastman v. Foster, 8 Met. 19; Murphy v. Maryland, 8 Cush. —; Christian v. Dripps, 28 Pa. St. 271; English v. Foote, 16 Miss. 444; Perkins v. Swank, 43 Mass. 349; Smith v. Altick, 24 Ohio, 389; Waltriss v. First Nat. Bank, 7 Cent. L. J. 206.

of the building, and operated by the engine and shafting fastened to the building by screws and bolts, annexed by the purchaser and especially adapted to be used in connection with the freehold, could not be severed without the consent of the holder of the legal title; but that a steam engine and boiler, portable and in their own frames, a planing machine and anvils resting on the floor or ground and not fastened, vices merely annexed to a work-bench by screws and bolts, a grindstone on a movable frame, and an emery machine set on the floor and fastened with bolts, but more connected with the engine and boiler which were not fixtures than with any articles which were, and capable of removal without material injury to the realty and of being used elsewhere, had never lost their character of chattels and might be removed.

Where H contracted with S to put boilers in his mill in place of worn out, old ones, to be paid $4 per month for their use, and to have the right to remove them whenever he pleased, and they could be removed without other injury than taking down the boiler-wall built of brick and standing under a shed outside the mill: *Held*, that this was a hiring of chattels, that they did not become subject to a prior mortgage on the land, and hence did not pass by sale of the land on execution issued on a judgment thereon.[5]

It is held in New Hampshire, that where a manufacturer delivered to the owner of a machine shop a boiler to be used on trial, said boiler, by agreement, to remain the property of such manufacturer till paid for, and the same is placed in said shop and is put in use to generate the steam necessary to run the machinery therein, and the owner of said shop, without having paid for such boiler, mortgage the whole plant including said boiler in express terms, the mortgagee having no notice of any claims against it by a third party until foreclosure, said boiler became part of the realty, and passed under the mortgage.[6]

In Christian v. Dripps, two persons were engaged as partners in a manufactory, and upon a third person being taken in as a partner, the real and personal estate was charged upon the books of the firm as partnership property of the new firm. The real estate consisted of a foundry and machine shop theretofore sold by articles of agreement, running from the plaintiff to the two partners first mentioned, the legal title remaining in the plaintiff. The incoming partner put in certain machinery with which he was credited: *Held*, that all being in possession as owners, and none as tenants, and the machinery being the property of the firm, it became a fixture independent of the actual ownership of the real estate, and notwithstanding the title of the third partner to the real estate might be defective for want of compliance with the statute of frauds, the annexation being otherwise sufficient.

In Vermont, a distinction is justly made between machinery placed in the mill before, and that annexed after the execution of the mortgage upon the land, and it is held, that as to the machinery which was in the yard, but had not been placed in the mill at the time of the execution of the mortgage upon the land, but was annexed afterwards as to which the mortgagee of the land was not misled, and advanced nothing on the faith of it, the right of the conditional vender of such machinery is paramount to that of the mortgagee of the land.[8]

In discussing this question, Folger, J., in Tifton v. Horton, said: "It may, in this case, be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures and would pass a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement power was given to the plaintiffs to enter upon the premises in certain contingencies, and to take and carry them away. While there is no doubt but that the intention of the owner of the land was, that the engine and boilers should ultimately become a part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels, until the price of them had been fully paid. And as the parties may, by their agreement expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves the agreement in this case was fully sufficient to that end. But it is contended that where, in the solution of this question, the intention is a criterion, it must be the intention of all those who are interested in the lands; and that here the defendants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owners thereof, whether before or after the execution of a mortgage upon it, become subject to the lien thereof; yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale, to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs, on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such agreement upon the covenants in his conveyance of the lands.[9]

But where the articles in question (a steam engine and boiler bolted to permanent and substantial foundations, shafting and gearing fitted, adapted and firmly fastened to the building where used, and of no use elsewhere except as old material) are actually and firmly annexed to the freehold in as permanent and substantial a manner as is usual, and as is adapted to the nature and objects of their employment, though capable of being removed without injury to the building, there being no special intent on the part of the owner of the fee as to making them a part of the freehold, and no intention to make such articles a permanent accession to the freehold; and the execution of a chattel mortgage upon the articles in question being placed in the mill, is not sufficient to overthrow this presumption and raise the contrary one of an intention to preserve their character as personalty."[10]

[5] Hill v. Sewald, 53 Pa. St. 271. See, however, Fryatt v. Sullivan Co., 5 Hill, 116; Thomas v. Davis, 15 Cent. L. J. 489.

[6] McLaughlin v. Nash, 14 Allen, 136; Pierce v. George, 108 Mass. 76; McConness v. Blood, 123 Mass. 47; Shoemaker v. Simpson, 3 Cent. L. J. 651; 15 Cent. L. J. 489.

[7] 28 Pa. St. 271.

[8] Frankland v. Moulton, 5 Wis. 1.

[9] Mott v. Palmer, 1 N. Y. 564; Ford v. Cobb, 20 N. Y. 344.

[10] Voorhees v. McGinnis, 48 N. Y. 278; Frankland v.

In Ohio, it is held that although the parties concerned may make a binding agreement that would otherwise be a fixture, shall be regarded as personalty, such agreement will not affect the rights of a subsequent mortgagee of the realty without notice of it, and that the delivery and filing of a chattel mortgage upon the property which is the subject of the agreement, does not constitute the required notice.[11]

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Moulton, 5 Wis. 1; Pierce v. George, 108 Mass. 78; Perkins v. Swank, 43 Mass. 363; Tibbetts v. Moore, 23 Cal. 208.

[11] Manufacturing Co. v. Garver, 18 N. E. Rep. 493.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. AGISTMENT—Sheriff—Lien.——When a sheriff takes possession of cattle at the request of a mortgagee thereof to sell them as therein authorized, but the mortgage is amicably satisfied, the sheriff has a lien, under Montana law, on the cattle for his services therewith.—*Vose v. Whitney*, S. C. Mont., Jan. 19, 1888; 16 Pac. Rep. 846.

2. APPEAL—Assignment of Errors.——A request to take the grounds in a motion for a new trial as an assignment of errors, is not sufficient uuder the rule of court.—*Brown v. Martin*, S. C. Tex., Nov. 22, 1887; 7 S. W. Rep. 68.

3. APPEAL—Justice's Court—Judgment—Statute.——Construction of Nebraska statutes relative to appeals from justice's courts and the filing of transcripts from those courts in the appellate courts.—*Wilson v. Wilson*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 661.

4. APPEAL—Motion for New Trial.——When there is no motion for a new trial only the record proper will be reviewed, and the refusal of the court to award a jury to assess defendant's damages in condemnation proceedings is not a part of such record.—*Kansas, etc. R. Co. v. Carlisle*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 102.

5. APPEAL—Record—Evidence.——When the abstract does not purport to contain all the evidence, an objection that the evidence does not support the judgment cannot be entertained.—*Drake v. Kaiser*, S. C. Iowa, March 7, 1888; 36 N. W Rep. 652.

6. APPEAL—Second New Trial.——A second grant of a new trial on account of a conflict between the evidence and the verdict will be closely scrutinized.—*Taylor v. Central, etc. Co.*, S. C. Ga , Feb. 13, 1888; 5 S. E. Rep. 114.

7. ARBITRATION—Construction.——Where one sold o another a quantity of goods warranted to be of a certain quality, and upon complaint that they did not answer the warranty, it was agreed that the matter be referred to arbitrators who awarded the buyer one-sixteenth of a cent per pound as damages: *Held*, that the award was within the powers of the arbitrators and that the seller was bound by it.—*Cobb v. Dolphin, etc. Co.*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 438.

8. ATTACHMENT—Customs Officer.——A State officer cannot make a valid attachment of property in a bonded warehouse or under the control of a United States customs officer.—*Peabody v. Maguire*, S. J. C. Me., Dec. 27, 1887; 5 N. E. Rep. 694; 12 Atl. Rep. 630.

9. ATTACHMENT—Malicious Attachment—Payment.——An action for maliciously attaching plaintiff's property, is not barred by the fact that the plaintiff paid the debt for which the property was attached and the cost of the attachment.—*Brand v. Hinchman*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 664.

10. BANKRUPTCY—Composition.——If the time for the performance of a condition in a composition in bankruptcy has expired, and the condition has not been performed, a creditor may maintain an action on his original demand.—*Harrison v. Gamble*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 682.

11. BILLS AND NOTES—Alteration.——Any material alteration, though innocently done, in an indorsement of a promissory note without the knowledge of the indorser, invalidates the indorsement.—*Davis v. Eppler*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 793.

12. BILLS AND NOTES — Indorsement — Notice.——A forged draft was indorsed to be paid to A for the account of the payee, and before payment A stamped it paid with his name attached, and received the money from the drawee and paid it to the payee before notice of any fraud: *Held*, that A was not liable to the drawee for the money received.—*Vogel v. Ball*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 101.

13. BILLS AND NOTES—Presentment for Payment.——When the holder of a note cannot with due diligence ascertain the residence of the makers, it is sufficient demand for payment that he has the note when due ready to be presented at the place where it is dated.—*Davis v. Eppler*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 793.

14. BONDS — Official — Form.——A constable's bond, executed to the State as obligee, instead of to the township trustee as required by law, is good as a common law bond.—*State v. Horn*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 116.

15. BRIDGE—Statute — Weight of Load.——Where a statute prescribes the weight of a load, exclusive of vehicle and team, which may be carried over a bridge, the weight of a driver is to be reckoned as part of the weight of the load.—*Dexter v. Canton, etc. Co.*, S. J. C. Me., Dec. 27, 1887; 5 N. Eng. Rep. 704; 12 Atl. Rep. 547.

16. BROKERS — Commissions — Purchaser.——When the price of property and the terms of payment are fixed, and the broker procures a purchaser, with whom the seller effects the sale, the broker is entitled to his commissions.—*Butler v. Kennard*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 579.

17. CARRIERS — Negligence — Injury to Goods — Evidence.——Where goods are delivered in good order to a carrier, and upon arrival at destination are found to be damaged, it is error to instruct the jury to find for the defendant, the carrier.—*New York, etc. Co. v. Ely*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 482.

18. CARRIERS—Railroad Conductor — Liability.——A railroad is liable for any abuse of his authority in collecting fare or taking up tickets by a conductor.—*Southern, etc. R. Co. v. Rice*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 817.

19. CHATTEL MORTGAGES — Future Advances. ——A chattel mortgage to secure payment of all supplies to be furnished by the following October, does not secure advances made subsequent to that date.—*Fort v. Black*, S. C. Ark., Feb. 11, 1888; 7 S. W. Rep. 131.

20. CHATTEL MORTGAGE—Notice—Execution.——Under Kentucky law, the holder of an unrecorded mortgage of personal property may, after giving notice of his mortgage, arrest the sale of the property on execution on a judgment rendered against the mortgagor prior to the execution of the mortgage.—*Baldwin v. Crow*, Ky. Ct. App., Feb. 14, 1888; 7 S. W. Rep. 146.

21. CONSTITUTIONAL LAW — Title of Act — Mechanic's Lien.——The title of the act making it a criminal offense for a contractor for any building to receive full pay and to neglect paying his men, covers its provisions.—*State v. Brachvogel*, S. C. Minn., March 5, 1888; 36 N. W. Rep. 641.

22. CONTRACT — Breach — Damages — Evidence.—— Where one leased a saloon upon condition that liquor should not be sold in the adjoining store, and the evidence showed that liquor was so sold in the adjoining store, which was the resort of many persons for the purpose of buying it: *Held*, that such evidence should properly go to the jury on the question whether plaintiff was not entitled to substantial damages.—*Schlitz, etc. Co. v. McCann*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 445.

23. CONTRACT — Building Contract — Specifications — Change. ——Where one is awarded a contract for furnishing stone for a public building, and subsequently another contract for cutting such stone, the latter contract containing a clause authorizing the other party to make changes in the character of the work to be done: *Held*, that the two are independent contracts, and that the contractor can sue for damages for a change made by the commissioners from cut sandstone to brick with sandstone trimmings for the facings of the walls.—*McMaster v. State*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 417.

24. CONTRACTS—Interpretation—Court.——In an action on a contract, when there is no ambiguity in its language when applied to the undisputed facts, it is the province of the court to interpret it.—*Home, etc. Co. v. Roe*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 594.

25. CONTRACTS — Seals — Corporations. —— Only the board of directors can alter the seal of a corporation, and its contract with the seal of its chief engineer is not a specialty, and may be sued on in *assumpsit*.—*Saxton v. Texas, etc. R. Co.*, S. C. N.Mex., January Term, 1888; 16 Pac. Rep. 851.

26. CORONER—Inquest—Physicians.——When physicians are employed by a coroner to make a scientific examination of the body under view, and they render the services, it is immaterial that the evidence fails to show that the jury deemed it requisite to summon them.—*Pueblo Co. v. Marshall*, S. C. Colo., Feb. 3, 1888; 16 Pac. Rep. 837.

27. CORPORATION—Contractor—Negligence—Gas Company.——A natural gas company is not responsible in damages for the explosion of a main laid by an independent contractor, when there is no testimony tending to show that the company had accepted the work of the contractor.—*Charities, etc. Co. v. Lynch*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 435.

28. CORPORATION — Religious Association. —— The majority of the pew owners of a religious association can control the meeting house and order repairs thereon at any regular meeting of the corporation, but cannot do so at a meeting called by a justice of the peace for the purpose of organizing the corporation.—*Mayberry v. Mead*, S. J. C. Me., Jan. 3, 1888; 5 N. Eng. Rep. 692; 12 Atl. Rep. 635.

29. CRIMINAL LAW—Appeal—Statutes. —— Construction of New York Code of Civil Procedure, with reference to appeals taken to the court of appeals before the enactment of a particular statute,—*People v. Brunt*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 435.

30. CRIMINAL LAW—Indictment — Assault with Dangerous Weapon.——When an indictment charges assault with dangerous weapon, with intent, etc., under § 1740 of code, "with intent," etc., may be treated as surplusage, and a conviction of assault with a dangerous weapon sustained, under § 1744.—*State v. McLennen*, S. C. Oreg., Feb. 6, 1888; 16 Pac. Rep. 879.

31. CRIMINAL LAW—Larceny — Claim of Right.—— When one takes property under a fair claim of right, it is not larceny.—*Causey v. State*, S. C. Ga., Jan. 30, 1888; 5 S. E. Rep. 121.

32. CRIMINAL LAW—Seduction — Evidence. —— On a criminal trial for seduction, under promise of marriage, the defendant may prove that prior to the alleged seduction the prosecutrix was guilty of acts of lewdness and unchastity with other men.—*State v. Wheeler*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 103.

33. CRIMINAL PRACTICE—Assault with Intent to Kill.—Instructions. —— When, in a trial for maliciously shooting and wounding, with intent to kill, there is evidence tending to show that the defendant shot in self-defense, he is entitled to an instruction embodying and defining the law of self-defense.—*Com. v. Cook*, Ky. Ct. App., Feb. 14, 1888; 7 S. W. Rep. 155.

34. COUNTERCLAIM — Delay — Acceptance. —— In an action for the price of stone supplied, defendant can set up as a counterclaim his damages caused by delay in delivery, though he accepted and used the stone.—*Schweickhart v. Stuewe*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 605.

35. COUNTIES—County-seat— Mandamus. —— A proceeding by *mandamus*, brought by a private person, to compel county officers to hold their offices at the county-seat, is not conclusive against the State, under the law relative to contesting the location of county-seats.—*State v. Stock*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 799.

36. COURTS—Jurisdiction—Presumption.——When an administrator sues and the defendant denies that the probate court had jurisdiction to appoint an administrator, the burden of proof is on the defendant to show that the court transcended its authority.—*Masters v. Brunker*, Ky. Ct. App., Feb. 16, 1888; 7 S. W. Rep. 158.

37. COURTS—Probate— Judgments. —— The probate court of the city of St. Louis can, in the same term, set aside a judgment rendered therein by default.—*Rottman v. Schmucker*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 117.

38. DAMAGES—Measure of Damages—Telegraph Company—Mistake.——Where a telegraph company makes a mistake, by reason of which the sale of goods is made for a less price than might have been obtained if the message had been properly transmitted, the measure of damages is the difference between the actual value of the goods and the price for which they were sold.—*Western, etc. Co. v. Landis*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 467.

39. DEDICATION—Prescription—Street — Acceptance.—Where a street has been laid off and used as such for fifty years, it is a public street by prescription, although it has never been accepted by the city.—*Commonwealth v. Morehead*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 424.

40. DEED—Mental Capacity. —— Under the circumstances of the case the unreasonableness of the deed was held to be decisive of the want of mental capacity by the grantor, and was set aside.—*Pressey v. Gross*, Ky. Ct. App., Feb. 16, 1888; 7 S. W. Rep. 150.

41. DEED—Rent—Construction.——Where a deed is executed and delivered, all rights of the grantor in the premises, unless specially reserved, passes to the grantee. Rent secured by a lease but not accrued at the time of the execution of the deed, passes to the grantee. Conveyances of real estate should be construed by courts according to the intent and meaning of the parties under the rule of law.—*Eiseley v. Spooner*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 659.

42. DEED — Quitclaim — Recording.——A quitclaim deed is included in the Missouri law relative to recording all deeds affecting real estate, and so with an agreement signed by the payees of certain notes at the time of the execution of a deed of trust, that they would not foreclose until they had sustained actual loss by the failure of the maker to appear at court at a certatn term of court, for which appearance he had given bond.—*Munson v. Ensor*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 108.

43. DEPOSITIONS—Abuse of Process—Habeas Corpus.——When a deposition of a witness, who is a party to a cause, is taken to worry and annoy him, if committed by the notary for refusing to give his deposition, he will be released on *habeas corpus*.—*In re Davis*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 790.

44. DESCENT AND DISTRIBUTION—Account—Executor.——Where, upon the accounting of an executor, it appears that some of the distributees have been overpaid their share, the shares will be equalized upon a future accounting.—*Appeal of Vanderford*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 491.

45. DISCOVERY—At Law—Corporations.——The statute in respect to discovery does not seem adapted to obtaining a discovery from a corporation.—*Hatcher v. First Nat. Bank*, S. C. Ga., Feb. 6, 1888; 5 S. E. Rep. 127.

46. DRAINAGE—Commissioners.—— Drainage commissioners can have jurisdiction of laying off a ditch upon the application of five freeholders of the county, although not of the township, which application properly describes the proposed ditch.—*Kinnie v. Bare*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 672.

47. DRAINAGE — Town Trustees — Writ of Error—Injunction.——In Ohio, the proper remedy for errors committed by town trustees in the matter of drainage, is writ of error and not injunction.—*Huff v. Fuller*, S. C. Ohio, Jan. 10, 1888; 15 N. E. Rep. 479.

48. EJECTMENT—Defense—Title.——When defendant, in ejectment, relies on a title from a foreclosure sale, to which proceedings he was a stranger, he need only show a judgment and a deed thereunder.—*Moore v. Frazier*, S. C. Oreg., Jan. 30, 1888; 16 Pac. Rep. 869.

49. EJECTMENT—Necessary Title.——One who has a claim to land by color of title, may recover it from one in possession without color or claim of title.—*Douglass v. Rufin*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 783.

50. EJECTMENT—Occupying Claimant's Law.——Proceedings under the occupying claimant's law commenced without the request of either party, or a journal entry thereunder, are void. Under that law the party in possession is entitled to pay for all lasting and permanent improvements, including necessary sidewalks.—*Hentig v. Redden*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 820.

51. EMBEZZLEMENT—Banking.——A cashier of an unincorporated banking association, is guilty of embezzlement, under the laws of Ohio, if he appropriates the funds of the association to his own use, although he may be a shareholder in the association.—*State v. Kusnick*, S. C. Ohio, Feb. 21, 1888; 15 N. E. Rep. 481.

52. EMINENT DOMAIN—Constitutional Law.——A statute which confers upon corporations organized for the benefit of art and science, and not for profit, the right to take property by eminent domain is not unconstitutional, because the owner has a remedy for compensation at common law.—*Appeal of Rees*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 427.

53 EMINENT DOMAIN — Railroad — Corporation.——A railroad company, of which the only business was to convey sight seers for about four months along the Niagara river, is not such a corporation as is entitled, under the laws of New York, to condemn lands for railroad purposes under the right of eminent domain.—*In re Niagara Falls, etc. Co.*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 429.

54. EQUITY—Accounting—Joint Interest.—— Where A sells an interest in a horse to B and C, who agree to keep said horse for their joint use, sharing the profits and losses, the parties are bound to account with each other.—*Shirley v. Goodnough*, S. C. Oreg., Jan. 31, 1888; 16 Pac. Rep. 871.

55. EQUITY—Relief—Possession.——Where the suit is within the equitable jurisdiction of the court, and the relief is granted, and possession is incidental to such relief, the court may go on and award a writ of possession.—*Woodsworth v. Tanner*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 104.

56. ESTOPPEL—Partnership—Execution — Assignment.——Where a party received from an insolvent an assignment of a partnership interest, and a judgment note made by the same parties and proceeded to take judgment on the note, and levied his execution on the partnership interest: *Held*, that he was estopped from claiming any interest under the assignment.—*Appeal of Van Stavoren*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 499.

57. ESTRAYS—Due Process of Law—Notice.——Taking up an estray, under Oregon law, is not depriving an owner of his property without due process of law. The fact that the brand on an animal is recorded, is not constructive notice of the ownership of the animal.—*Stewart v. Hunter*, S. C. Oreg., Feb. 6, 1888; 16 Pac. Rep. 876.

58. EVIDENCE.—— Where a nun sued for property given to her by the will of an ancestor, her deposition to the effect that the nuns, after taking the vows, held all property in common, was properly excluded, because it did not show that the plaintiff had parted with the property, and because it was secondary evidence.—*White v. Price*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 427.

59. EVIDENCE—Damages — Value of Property.——A witness who has testified to the value of property, and that after the construction of the railroad near it it would not sell at all, and its rental value had decreased, cannot be asked what it cost a number of years before.—*Denver, etc. Co. v. Schmitt*, S. C. Colo., Jan. 27, 1888; 16 Pac. Rep. 842.

60. EVIDENCE—Declarations of Agent.——In an action for damages caused by the negligence of defendant's agent, his statement as to the cause of the injury, made two hours thereafter, is inadmissible.—*Dodge v. Childs*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 815.

61. EVIDENCE—Experts— Water-courses.—— Expert testimony is competent to show the effect of a dam on the channel of the stream above it and upon the operation of a mill above it.—*Ball v. Hardesty*, S. C. Kan., Feb. 11, 1886; 16 Pac. Rep. 808.

62. EVIDENCE — Handwriting — Expert.—— Under a plea of *non est factum*, after the payee and others have testified that a note was written by the maker, an expert may testify that letters written by the payee and the body of the note are in the same handwriting.—*Wagoner v. Ruply*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 80.

63. EVIDENCE — Weight — Witnesses.—— Where the weight of evidence is equal the greater number of witnesses will prevail.—*Katzenbach v. Holt*, N. J. Ct. Chan., Feb. 8, 1888; 12 Atl. Rep. 383.

64. EXECUTOR—Accounting—Laches — Equity.—— A court of equity will not compel an executor to account for his testator's dealings with a third person, if the latter appears to have been guilty of laches in not obtaining an accounting in the life-time of the testator, and fails to show that anything is probably due to him.—*Osborne v. O'Reilly*, N. J. Ct. Err. & App., Feb. 2, 1888; 12 Atl. Rep. 377.

65. EXECUTORS — Fraudulent Conveyances by Deceased.——When an administrator is satisfied that the assets of an estate are insufficient to pay its debts, he

should, under Wisconsin law, bring suit to set aside conveyances made by the deceased in fraud of his creditors, without waiting to have the claims of creditors judicially established.—*Andrew v. Hinderman*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 624.

66. EXECUTORS—Purchase by Executor—Court—Judicial Discretion.——Where an executor, by leave of the orphan's court, purchases land, part of the estate of his testator, at a sale by the master, and the court approves the sale, it will not be set aside, the approval being within the judicial discretion of the court and not reviewable.—*Appeal of Dundas*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 485.

67. EXECUTORS—Sale of Realty—Deed.——In Arkansas, an administrator's deed, purporting to have been acknowledged and duly recorded prior to January 1, 1883, is *prima facie* evidence of its recitals as to the legality and regularity of the sale, though the acknowledgment is defective.—*Cupp v. Welch*, S. C. Ark., Feb. 25, 1888; 7 S. W. Rep. 139.

68. EXECUTORS—Setting Apart Exempt Property.——Where the deceased left a widow and an infant child by a prior wife, which lived with its grandparents, the widow takes all the property to be set apart for the support of the widow and infant children, under Kentucky law.—*Alexander v. Alexander*, Ky. Ct. App., Feb. 16, 1888; 7 S. W. Rep. 156.

69. EXECUTORS AND ADMINISTRATORS—Jurisdiction — Consideration—Equity—Evidence.——A court of equity has jurisdiction of an action by an administrator against his coadministrator, relating to a claim made by the latter on the estate of the intestate. A promissory note given by a mother to her daughter for services rendered, is evidence of sufficient consideration.—*Petty v. Young*, N. J. Ct. Err. & App., Feb. 4, 1888; 12 Atl. Rep. 392.

70. EXEMPTION—Execution — Claim.——Under Arkansas law, a debtor who wishes to claim his exemption of personal property must prepare his schedule upon the issue of any execution on a judgment, though certain property has been set off to him under the first execution issued on that judgment.—*Weller v. Moore*, S. C. Ark., Feb. 4, 1888; 7 S. W. Rep. 130.

71. FENCES — Division — Removal.——The Kentucky law about the removal of division fences, applies to both city and country property, and it is immaterial whether the fence is on the dividing line or who owns the land on which it stands.—*Grief v. Kahn*, Ky. Ct. App., Feb. 18, 1888; 7 S. W. Rep. 159.

72. FRAUD—Affidavit of Defense.——Where, upon an action for rent accruing under a lease, the affidavit of defense stated that plaintiff had falsely represented that a railroad siding belonged to the premises, without which they could not be properly used: *Held*, that it was error to render judgment against the defendant on the ground of want of sufficient affidavit of defense.—*Morris v. Shakespeare*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 414.

73. FRAUD—Deed — Evidence.——Where the ground of an action is that fraud has been practiced in obtaining a deed, and no evidence of such fraud appears in the testimony, there is no question for the jury.—*Rogers v. Percy*, S. J. C. Me., Dec. 30, 1887; 5 N. Eng. Rep. 703; 12 Atl. Rep. 545.

74. FRAUD—Jury.—— Questions of fraud are for the jury upon all the circumstances of the case as shown by the testimony. If the evidence substantially supports the verdict it will not be disturbed.—*Riley v. Melquist*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 657.

75. FRAUDULENT CONVEYANCES—Demand—Action.——A demand by an assignee in insolvency is not necessary to support an action against a purchaser, who purchased from the assignor with intent to hinder and delay his creditors.—*Cerf v. Phillips*, S. C. Cal., Feb. 25, 1888; 16 Pac. Rep. 778.

76. FRAUDULENT CONVEYANCE — Innocent Mortgagee.——An innocent mortgagee of land from a grantee in a deed void as to the creditors of the grantor, has a paramount title over a purchaser of the land under an execution issued on a judgment subsequently obtained against the grantor.—*Clapp v. Saunders*, S. C. Iowa, March 7, 1888; 36 N. W. Rep. 655.

77. FRAUDULENT CONVEYANCES—Possession.——When an insolvent gives a bill of sale of the fixtures used in his saloon to his brother, an employee therein, but retains possession of saloon and fixtures as owner till they are attached by his creditors, such continuance of possession is *prima facie* evidence of a secret trust, which is a fraud on his creditors.—*Valley D. Co. v. Atkins*, S. C. Ark., Feb. 25, 1888; 7 S. W. Rep. 137.

78. HABEAS CORPUS — Chinese Immigration.——The district court has jurisdiction to issue the writ of *habeas corpus* when a Chinaman is prevented from landing by the customs officers. A Chinaman who has lost his certificate, which has not been presented in the meantime, may land upon proof of these facts and upon being identified. A Chinaman who left after the passage of the first act restricting Chinese immigration and prior to the second, may return without complying with the provisions of the second act.—*U. S. v. Jung Ah Lung*, U S. S. C., Feb. 13, 1888; 8 S. C. Rep. 663.

79. HIGHWAY—Authority — Statute. ——Construction of Pennsylvania statutes relative to the laying out of highways in boroughs and elsewhere, and the authority under which they may be laid out.—*In re Road Verana, etc. Township*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 456.

80. HIGHWAY—Railroad Use — Review.——The party applying for a review of an order granting the use of a highway to a railroad, must have an interest therein distinguishable from that of the mass of the community.—*Ashe v. Board Supervisors*, S. C. Cal., Oct. 29, 1886; 16 Pac. Rep. 783.

81. HOMESTEAD — Abandonment. ——Claimant and family left the premises to earn a living and acquired no other homestead. All of his furniture was not removed and his tenant held at will. He swore he left for a temporary purpose and always intended to return: *Held*, that there was no abandonment of the homestead.—*Boot v. Brewster*, S. C. Iowa, March 6, 1888; 36 N. W. Rep. 649.

82. HOMESTEAD—Abandonment—Debts.——When the ancestor abandons her homestead rights before her death, an heir's interest in the land is subject to the lien of a judgment recovered upon his antecedent debts.—*Baker v. Jamison*, S. C. Iowa, March 6, 1888; 36 N. W. Rep. 647.

83. HOMESTEAD — Mortgage — Waiver. —— When a debtor mortgages his homestead, he does not thereby waive his homestead rights as to his other creditors.—*Hall v. Pulghum*, S. C. Tenn., Feb. 28, 1888; 7 S. W. Rep. 121.

84. HUSBAND AND WIFE — Antenuptial Judgment — Scire Facias.——A wife who, before marriage, obtained a judgment against her husband, may keep up the lien thereof by *scire facias* after the marriage.—*Kinkade v. Cunningham*, S. C. Penn., Jan. 30, 1888; 12 Atl. Rep. 410.

85. HUSBAND AND WIFE—Coverture — Insurance.—— Where a husband assigned to his wife a policy of insurance on his life, and afterwards he and she assigned it to a trustee to hold for her benefit and that of their child, after the husband's death she consented to the payment of several of her husband's debts out of the policy fund: *Held*, that plaintiff was not bound by the assignment of the policy made to the trustee, and could recover from him the amount of the policy, less the disbursements she had authorized.—*Love v. Love*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 498.

86. HUSBAND AND WIFE—Divorce — Deed — Acknowledgment.—— Where husband and wife have been divorced from bed and board by decree of a court of competent jurisdiction, which prohibited the husband from interfering with the property of the wife, a deed of land made by her afterwards cannot be attacked collaterally by a stranger to the title because her acknowledgment did not state according to the statute that the deed was executed by her freely, voluntarily

and without the compulsion of her husband.—*Delafield v. Brady*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 428.

87. HUSBAND AND WIFE—Entirety—Judgment — Mortgage.——Where husband and wife held an estate by entirety and mortgaged it, and after the wife's death it was sold under a judgment rendered against the husband before the execution of the mortgage, it was held that the purchaser under the judgment took a good title as against the mortgage, the wife's interest having lapsed by her death.—*Fleek v. Zilbliaver*, S. C. Penn., Oct. 17, 1887; 12 Atl. Rep. 420.

88. HUSBAND AND WIFE—Fraudulent Conveyance.—— A conveyance by a husband to his wife of all his property, in payment of a debt due by him to her, larger than the value of the property, is valid against the claim of his creditor which accrued prior to such conveyance.—*Dull v. Merrill*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 677.

89. HUSBAND AND WIFE — Personal Property. —— When a husband takes money received by his wife as a gift from her father, and purchases real estate in his own name, with her consent, but not with her written consent, he is only a trustee for his wife.—*Broughton v. Brand*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 119.

90. HUSBAND AND WIFE—Separate Estate—Purchase. ——A deed from a husband to his wife, who has furnished the purchase money from her separate estate, will be upheld against purchasers with notice of her rights.—*Woodsworth v. Tanner*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 104.

91. HUSBAND AND WIFE—Trust—Separate Estate.—— Where husband and wife conveyed to H land, to be held by him in trust for the separate use of the wife, and the deed required H to convey the property afterwards to the wife, and he made such a conveyance, the wife took under it an estate in fee simple, and not an estate for her sole and separate use.—*Warden v. Lyons*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 408.

92. INFANCY—Contract—Disaffirmance.——An infant before or upon obtaining his majority, may disaffirm a contract for personalty other than necessaries, without restoring the property, if it has ceased to be within his control, either rightfully or wrongfully.—*Lamon v. Beeman*, S. C. Ohio, Jan. 10, 1888; 15 N. E. Rep. 476.

93. INFANT—Deed—Guardian.——A deed made by the guardian of an infant is inadmissible in a suit to recover real estate, without evidence that the guardian was duly appointed and had authority to make the deed.—*House v. Brent*, S. C. Tex., Nov. 1, 1887; 7 S. W. Rep. 65.

94. INJUNCTION—Mandatory.——A preliminary mandatory injunction will be ordered only in case of extreme necessity.—*Delaware, etc. Co. v. Central, etc. Co.*, N. J. Ct. Err. & App., Feb. 2, 1888; 12 Atl. Rep. 374.

95. INJUNCTION—Result of Election. —— When the county commissioners, believing the proper petition has been presented, order an election on the question of changing a county-seat, an injunction cannot issue to restrain the publication of the result of the election. —*People v. Board of Supervisors*, S. C. Cal., Feb. 25, 1888; 16 Pac. Rep. 776.

96. INSURANCE—Conditions—Parol Evidence.——When a party sues on a policy of insurance, and does not allege any mistake or fraud in its execution, and the defendant alleges the plaintiff's breach of some of its conditions, parol evidence that the plaintiff did not agree to the conditions is inadmissible.—*Liverpool, etc. Co. v. Morris*, S. C. Ga., Feb. 18, 1888; 5 S. E. Rep. 125.

97. INTEREST—Statement Rendered.—— An account which, with the debtor's knowledge and without his protest, is treated by the creditor as bearing interest, the claim being a large one and running for more than a year, is liquidated from the time an account is rendered and payment demanded, and bears interest from that time.—*Henderson, etc. Co. v. Lowell M. S.*, Ky. Ct. App., Feb. 14, 1888; 7 S. W. Rep. 142.

98. INTOXICATING LIQUORS—Attorney's Fee. —— The law authorizing the closing of the building for one year and taxing an attorney's fee against the defendant in intoxicating liquor cases, may be applied in a suit pending before the passage of the act.—*Drake v. Jordan*, S. C. Iowa, March 7, 1888; 36 N. W. Rep. 653.

99. INTOXICATING LIQUORS—Burden of Proof—Parties. ——Under Iowa law, when intoxicating liquors are sold, the burden is on the defendant to show that the sale was legal. Where two persons own property alleged to be a nuisance, both must be brought into court before a decree can be rendered to destroy the property or abate the nuisance.—*Shear v. Green*, S. C. Iowa, March 6, 1888; 36 N. W. Rep. 642.

100. INTOXICATING LIQUORS — Citizenship — Constitutional Law.——The Iowa prohibitory law is constitutional. When, in an action, under the Iowa prohibitory law, a person sues in a representative capacity, a general denial does not put in issue an allegation of citizenship.—*Kaufman v. Dostal*, S. C. Iowa, March 16, 1888; 36 N. W. Rep. 643.

101. INTOXICATING LIQUORS—Injunction—Contempt.— Evidence for contempt in violating an injunction about selling intoxicating liquors may, under Iowa laws, be taken orally.—*Goetz v. Stutsman*, S. C. Iowa, March 6, 1888; 36 N. W. Rep. 644.

102. INTOXICATING LIQUORS— Statute. —— Construction of Pennsylvania statute relative to the sale of intoxicating liquors.—*Commonwealth v. McCandless*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 440.

103. INTOXICATING LIQUORS—Statute—Local Statute— Penalty. —— Construction of Pennsylvania statutes relative to intoxicating liquors, penalties for the sale thereof and local statutes affecting Allegheny county.— *Durr v. Commonwealth*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 507.

104. JUDGE—Absence— Adjournment. —— When the judge first appears at eleven A. M., on the fourth day of the term, he can proceed to hold court, under Texas laws.—*Texas, etc. Co. v. Douglas*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 77.

105. JUDGMENT—Default—Opening. —— When it appears by affidavit of defendant's former counsel that he had called repeatedly to notify the defendant that her case was set for trial, and finally found her on the day of the trial dead drunk, the court may refuse to open the judgment on the ground of the negligence of her attorney.—*Falkenberg v. Gorman*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 599.

106. JUDGMENT—Lien — Notice. —— The grantees of one whose title was based upon an unrecorded deeree, vesting title in him subject to a lien, are charged with notice of the lien.—*Martin v. Niblett*, S. C. Tenn., Feb. 17, 1888; 7 S. W. Rep. 123.

107. JUDGMENT—Record—Trying Title.—— When, in an action to try title, the defendant claims under a sale by virtue of an execution from a justice's court, but the transcript of the record does not show that an execution was issued, and shows that an appeal was taken, the transcript is not admissible.—*Stark v. Ellis*, S. C. Tex., Jan. 27, 1888; 7 S. W. Rep. 76.

108. JUDGMENT—Setting Aside — Waiver. —— Where, after the lapse of six years, a judgment is set aside by the court on its own motion, but without objection by either plaintiff or defendant, because the verdict in the case had been coupled with an impossible condition, all objection on the score of lapse of time was held to have been waived.—*Smaltz v. Hancock*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 464.

109. JURISDICTION—Amount— Courts. —— The question of the value of the property in controversy is, under Rev. Stat. Tex., art. 4823, to be determined by the assessment made by the officer serving the writ.— *Cleveland v. Tufts*, S. C. Tex., Jan. 27, 1888; 7 S. W. Rep. 72.

110. JURISDICTION—Federal Question.——A decision in a State court in a partition case, as to whether the Mexican government made a valid partition of real estate prior to the Guadalupe-Hidalgo treaty, does not

involve a federal question.—*Phillips v. Mound, etc. Assn.*, U. S. S. C., Feb. 13, 1888; 8 S. C. Rep. 657.

111. JURY—Trial by Jury—Constitutional Law.——The legislature may regulate the number of jurors in criminal cases, and a person convicted of an offense by a jury of six men in a justice's court, is not entitled to an appeal to a court where the jury is composed of twelve men, without paying or securing costs, on the ground that a denial of his demand deprives him of the right of term trial by jury.—*Re Marron*, S. C. Vt., Feb. 23, 1888; 5 N. Eng. Rep. 735; 12 Atl. Rep. 523.

112. LANDLORD AND TENANT—Rent—Set-off—Affidavit of Defense.——An affidavit of defense to an action for rent which claims an allowance for repairs on premises, and a board bill against plaintiff and his family as a set-off is a sufficient affidavit of defense.—*Mooney v. Reynolds*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 481.

113. LANDLORD AND TENANT—Waste—Privilege of Purchase.——A tenant with the privilege of purchase, which privilege he fails to exercise in the time allowed, is liable for waste he has committed on the premises, and the statute of limitations begins to run on an action therefor upon the expiration of his privilege.—*Powell v. Dayton, etc. R. Co.*, S. C. Oreg., Jan. 30, 1888; 16 Pac. Rep. 863.

114. LIMITATIONS — Acknowledgment — Oral.——Defendant owed a firm on open account, whose assets plaintiff owned before suit brought. The parties orally agreed on the balance due: *Held*, that a suit on such balance was not barred in two years.—*Kahn v. Edwards*, S. C. Cal., Feb. 29, 1888; 16 Pac. Rep. 779.

115. LIMITATIONS—Contracts to Convey Land.——Actions on contracts to convey lands can be brought within twenty years, under Wisconsin laws. —*Jacobs v. Spalding*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 608.

116. LIMITATION OF ACTIONS — Eminent Domain.——Where a railroad acquires a right of way over land, but the owner reserves his right to damages to improvements, the statute of limitations begins to run immediately upon the construction of the road.—*Fordyce v. Stone*, S. C. Ark., Feb. 4, 1888; 7 S. W. Rep. 129.

117. MALICIOUS PROSECUTION—Advice of Counsel.——When the defendant, before beginning a criminal proceeding, presented the matter fairly to the county attorney, and in good faith followed his advice, he cannot be sued for malicious prosecution. —*Schippel v. Norton*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 804.

118. MALICIOUS PROSECUTION—Instruction.——In an action for malicious prosecution, a charge which speaks of malice as consisting of bad motives, or such reckless disregard of the rights of another as to show evil intent, is correct.—*Biering v. First N. Bank*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 90.

119. MANDAMUS—Elections — Order.——When, in an application for a peremptory writ of *mandamus* to compel the board to canvass the returns, it appears that certain votes should be counted, which will elect a certain person, the court may order a count of such votes and the issue of a certificate to such person.—*Territory v. Bernalillo Co.*, S. C. N. Mex., Feb. 4, 1888; 16 Pac. Rep. 855.

120. MASTER AND SERVANT — Defective Appliances — Fellow-servant.——When an engineer is injured by the derailment of his engine, caused by the spreading of the track by the passage of a prior train where the rails were rotten, the master is liable and is not excused by the failure of the employees on the first train to give timely warning of the condition of the track.—*Gulf, etc. R. Co. v. Pettis*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 93.

121. MASTER AND SERVANT—Independent Contractor—Negligence.——Where a railroad company employs a contractor to move its cars by horse-power, such contractor is an independent contractor and the company is not responsible for the negligence of his servants.—*Philadelphia, etc. Co. v. Hahn*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 479.

122. MASTER AND SERVANT—Negligence—Contributory. ——When a railroad employee is injured in trying to board a moving train contrary to a known rule of the company, he cannot recover damages from the company.—*Gulf, etc. R. Co. v. Ryan*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 83.

123. MASTER AND SERVANT—Negligence—Contributory Negligence.——Where a servant knew of a defect in the premises, and had assisted in closing the hole which constituted the defect, and the hole had been reopened without his knowledge and he had been injured by putting his foot in it and had brought suit for damages: *Held*, that a nonsuit was properly ordered.—*Rick v. Cramp*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 495.

124. MECHANIC'S LIEN—Unauthorized Work—Ratification.——The retention of a bill which included charges for authorized and unauthorized work, is insufficient to give the mechanic a right of lien.—*Engfer v. Roemer*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 618.

125. MORTGAGE—Consideration—Fraud.——In a suit upon a mortgage the defendant may use any defense involving the consideration of the mortgage debt. If the defense goes to the entire consideration it must be tried upon the main issue; if only partial it must be heard by the court upon the motion for conditional judgment.—*Ladd v. Putnam*, S. J. C. Me., Dec. 24, 1887; 5 N. Eng. Rep. 700; 12 Atl. Rep. 628.

126. MORTGAGE—Decree for Possession—Profits.——The trustees of a railroad mortgage, who have obtained a decree for possession, are entitled to the profits earned since the commencement of the suit, when there are no current debts to pay.—*Dow v. Memphis, etc. R. Co.*, U. S. S. C., Feb. 20, 1888; 8 S. C. Rep. 673.

127. MORTGAGE — Foreclosure — Attorney's Fees.——When a mortgage secures a note, though the mortgage provides for an attorney's fee, there can be no recovery on foreclosure for a greater amount than is specified in the note,—*Hamlin v. Rogers*, S. C. Ga., Feb. 13, 1888; 5 S. E. Rep. 125.

128. MORTGAGE — Grantee—Paramount Title.——One who has obtained possession of property under grant from a mortgagor subject to the conditions of the mortgage, cannot assert a paramount title as against a purchaser at the foreclosure sale.—*Chadwick v. Island Beach Co.*, N. J. Ct. Err. & App., Feb. 4, 1888; 12 Atl. Rep. 380.

129. MORTGAGES—Release—Reformation.——When a woman is induced to release a mortgage by misrepresentation, when no payment has been made thereon, she is entitled as against the heirs of the mortgagor to have her release corrected according to the proper understanding.—*Lee v. Wagner*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 597.

130. MUNICIPAL CORPORATIONS — Defective Streets — Charter Provisions.——A provision in a city charter, that the city shall not be liable for injuries caused by defective streets, unless it be shown that an alderman in that ward was aware of the condition, does not apply when the obstruction was placed on the street by one of its employees while in its employ.—*Adams v. City of Oshkosh*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 614.

131. MUNICIPAL CORPORATIONS—Negligence.——A city is not responsible for any injury occurring at 7 o'clock P. M. in consequence of rain which fell in the afternoon of the same day.—*Springer v. City of Philadelphia*, S. C. Penn., Jan. 20, 1888; 12 Atl. Rep. 490.

132. MUNICIPAL CORPORATIONS — Negligence — Notice. ——A person claiming to be injured by the negligence of the city of Fond du Lac, must give the notice required in its charter being suing, the general law in that respect being repealed as to that city by its charter.—*Hiner v. City of Fond du Lac*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 632.

133. MUNICIPAL CORPORATIONS—Ordinances—Passage. ——In a city of the second-class, there were four aldermen, two of whom voted for an ordinance and two failed to vote, when the mayor voted yea and declared the ordinance passed: *Held*, that the proceedings were void.—*State v. Gray*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 577.

134. MUNICIPAL CORPORATIONS — Railroad Aid.——A township can only subscribe $15,000 and five per cent. additional of the assessed value of the property therein to aid railroads, which may be voted to one railroad or divided among several. When such subscription is accepted, it must be paid upon compliance with its terms in preference to a later subscription which was first complied with.—*Chicago, etc. R. Co. v. Osage Co.*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 828.

135. MUNICIPAL CORPORATIONS — Statute.——Construction of Delaware statute reincorporating the town of Dover and of the procedure proper under that statute.—*Fulton v. Town of Dover*, Del. Ct. Err. & App., Feb. 1, 1888; 12 Atl. Rep. 394.

136. MUNICIPAL CORPORATION—Statute — Nuisance.——A city is not responsible for failure to remove a nuisance, which, by statute, it is authorized to remove, unless the statute makes it imperative upon the city to remove the nuisance.—*McDade v. City of Chester*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 421.

137. MUNICIPAL CORPORATIONS—Streets—Railroads.——A railroad is liable to the owners of property abutting on a street, which property has depreciated in value by the occupation of the street by its track, though the municipality authorized such use.—*Denver, etc. R. R. v. Bourne*, S. C. Colo., Jan. 27, 1888; 16 Pac. Rep. 839.

138. NEGLIGENCE—Contributory Negligence.——One who in broad daylight walks into an unguarded, unwatched coal hole in a sidewalk, is not guilty of contributory negligence.—*Jennings v. Van Schaick*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 424.

139. NEGLIGENCE — Contributory Negligence.——Circumstances stated under which a plaintiff injured at a railroad crossing was held to be guilty of contributory negligence, and was nonsuited.—*Allen v. Pennsylvania*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 493.

140. NEGOTIABLE PAPER—Fraud—Innocent Holder.——Where a note is for the benefit of a firm, made payable to one partner, and by him fraudulently appropriated to his own use, that fact constitutes no defense as against an innocent holder of the note.—*Leatherman v. Hecksher*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 485.

141. NONSUIT—Cost—Statute — Construction.——Construction of Maine statutes with reference to the payment of cost by the plaintiff when he takes a nonsuit; rule as to prior payment of such cost before a second action can be brougt.—*Smith v. Allen*, S. J. C. Me., Dec. 6, 1887; 5 N. Eng. Rep. 702; 12 Atl. Rep. 542.

142. OFFICE—Eligibility — Residence.——A person is not eligible to an elective office who, for lack of residence, is not an elector at the time of the election, under the Nebraska constitution.—*State v. McMillen*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 587.

143. OFFICE—Tenure—Amendment.——The Utah act, March 11, 1886, making the terms of county treasurers two years, is not retroactive, and one elected before the term of the occupant has expired is not legally elected, otherwise if he is elected after the death of the occupant.—*Farrell v. Pingree*, S. C. Utah, Feb. 18, 1888; 16 Pac. Rep. 843.

144. PARENT AND CHILD—Consideration—Next Friend.——A father has the best right to act as the next friend to his infant child, in any litigation in which the rights of the latter are involved. Forbearance to sue, even on an unfounded claim, is a good consideration for a promise to pay money.—*Rice v. Meirs*, N. J. Ct. Chan., Feb. 7, 1888; 12 Atl. Rep. 369.

145. PARTITION—Deed to Third Party.——When a general warranty deed recites that the grantors have received their portion in division of land with A, and at the request of A, who also signs the deed, convey the remaining portion to B, of which portion A had the equitable title, the legal title to the remaining portion vests in B.—*Hargis v. Ditmore*, Ky. Ct. App., Feb. 9, 1888; 7 S. W. Rep. 141.

146. PARTNERSHIP—Accounting.——After a case between partners has been transferred to a court of equity and an account has been taken and a settlement made, it is too late to object that it was brought as an action at law.—*Squiar v. Ford*, Ky. Ct. App., Feb. 11, 1888; 7 S. W. Rep. 152.

147. PARTNERSHIP—Scope of Business.——A partnership engaged in growing and raising seeds for agricultural purposes, is not liable for a large quantity of roses and carnations ordered by one partner from a person acquainted with their business.—*Sargent v. Henderson*, S. C. Ga., Jan. 30, 1888; 5 S. E. Rep. 122.

148. PLEADING—Account —Note.——A defense to an action on an account, that a note was given therefor, is demurrable, unless it is stated that the note was given in payment, or that the time of payment was to be extended.—*Pendergrass v. Hellman*, S. C. Ark., Feb. 11, 1888; 7 S. W. Rep. 132.

149. PLEADING — Amendment — Departure. —— One who has brought an action in tort for fraudulently misrepresenting the quality of a boiler, claiming damages for the consequences of its defects, may amend his declaration by adding counts on the false and malicious statements of the defendant relative to the boiler, and such counts constitute no departure in pleading.—*Erie, etc. Co. v. Barber*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 411.

150. PLEADING—Amendment—New Cause of Action.——One who sues relative to real estate in the county where it lies, parties in another county cannot, after they answer, amend by inserting a second cause of action for damages for breach of covenants of warranty.——*Neal v. Reynolds*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 785.

151. PLEADING—Assumpsit.——In Pennsylvania, it is necessary that in an action of *assumpsit* there must be a statement of the cause of action filed by the plaintiff, and signed by him or his attorney. A mere filing of the note sued upon or a copy thereof is not sufficient.—*Gould v. Gage*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 476.

152. PLEADING—Breach of Contract—Damages.—— When, in an action for damages for failure to deliver a quantity of cheese, the complaint sets forth the price at which the plaintiff purchased and his damages, it is not necessary to state the value of the cheese at the time of delivery, nor that the plaintiff could have resold at a profit.—*Conover v. Mahnke*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 616.

153. PLEADING—Inconsistent Defenses—Election.—— When defendant, in answer to a creditor's bill, alleges that the sale made by him is legal, but that if it be set aside his homestead rights therein be respected, such defenses are not inconsistent.—*Stubendorf v. Hoffman*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 581.

154. PLEADING — Negligence—Contributory.——In an action for personal injuries caused by negligence, it is not necessary to allege that the plaintiff exercised due care or was without fault.—*O'Connor v. Mo. Pac. R. Co.*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 106.

155. PLEADING — Verification—Deed.——A purchaser of land may show, without verifying his answer, that there was no consideration for a prior deed made by an agent of their common grantor to another.—*Barnard v. Blum*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 98.

156. PRACTICE—Deposition—Refusal to Answer.—— The Texas law, that an interrogatory which a party refuses to answer, or answers evasively, shall be taken as confessed, applies only to pertinent and relative interrogatories.—*Barnard v. Blum*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 98.

157. PRACTICE—Instruction—General Knowledge.—— An instruction, that the jury may call to their aid and use the knowledge and experience they possess in common with the generalty of mankind, is not erroneous.—*Sanford v. Gates*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 807.

158. PRACTICE — Joint Defendants — Judgment.—— Where joint makers of a bond are sued thereon, and make a joint answer, but some of them subsequently withdraw their appearance, it is error to enter judgment

against such till judgment is had against those defending.—*Wilson v. Blakeslee*, S. C. Oreg., Feb. 2, 1888; 16 Pac. Rep. 872.

159. PRACTICE—Master — Report.——The report of a master made upon a reference of facts, has the effect of a verdict.—*Paul v. Frye*, S. J. C. Me., Dec. 22, 1887; 5 N. E. Rep. 691; 12 Atl. Rep. 544.

160. PRACTICE—Misconduct of Jury.——When, during a recess of court, the defendant takes two jurors into a public saloon and treats them to intoxicating liquor, the verdict should be set aside.—*Vose v. Muller*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 583.

161. PRACTICE—Trial—Burden of Proof.——When the allegations of a petition against a railroad for personal injuries do not *prima facie* show that the plaintiff was negligent, the burden is not on him to show that his negligence was not the cause of the injury.—*Gulf, etc. R. Co. v. Williams*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 88.

162. PRACTICE — Trial — Special Findings. ——When there is no general verdict, but only special findings, all the material issues must be passed on.—*Coleman v. St. Paul, etc. R. Co.*, S. C. Minn., March 5, 1888; 36 N. W. Rep. 638.

163. PRACTICE—Verdict—Special Questions.—— When a jury answers to a question submitted, "we do not know," such answer is equivalent to a simple denial.—*Union P. R. Co. v. Shannon*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 836.

164. PRINCIPAL AND AGENT—Commissions.—— When the acts of a principal break off a sale, the agent is not entitled to his commissions, unless the acts were done for that purpose.—*Taylor v. Cox*, S. C. Tex., Dec. 13, 1887; 7 S. W. Rep. 69.

165. PUBLIC LANDS—Grant — Amending Decree. —— When the supreme court has affirmed a decree of the district court confirming a land grant, it will, on motion, amend its decree by instructing the district court to amend its decree by inserting a description of the land, ascertaining by reference if any of the lands have been sold, and if so, declaring the mover entitled to scrip for other equivalent lands.—*United States v. De Morant*, U. S. S. C., Feb. 20, 1888; 8 S. C. Rep. 675.

166. PUBLIC LANDS—Grants—Exceptions. —— Where the patent to a railroad and its deed exclude mineral land, the patent is not conclusive that the land is not mineral.—*Chicago Co. v. Oliver*, S. C. Cal., Feb. 29, 1888; 16 Pac. Rep. 780.

167. PUBLIC LANDS — Release — Confirmation. —— A relinquished by ordinance its claim to public land in the possession of A, and by a subsequent ordinance took part of it for a public square. Afterwards congress granted the land to the city for the purposes specified in the two ordinances: *Held*, that A, under the first ordinance, acquired no vested right to the land taken by the second.—*Clark v. San Francisco*, U. S. S. C., Feb. 20, 1888; 8 S. C. Rep. 659.

168. PUBLIC LANDS — Unsurveyed — Fences. —— One who fenced in public lands granted him by a railroad, but the title to which he could not obtain in consequence of the non-survey of the township, is not guilty of illegally fencing public lands, under the act of February 25, 1885; nor if he settled on public lands and fenced them in with a view of entering them as soon as the proper land office could legally receive filing thereon.—*United States v. Godwin*, S. C. Mont., Jan. 18, 1888; 16 Pac. Rep. 850.

169. RAILROAD—Eminent Domain.—— Where a railroad company enters upon land of an individual without his consent or compensation paid to him, and builds a railroad thereon, which is operated until public rights intervene, the owner of the land cannot maintain a possessory action for the land, but can obtain compensation therefor.—*Indiana, etc. Co. v. Allen*, S. C. Ind., Feb. 7, 1888; 15 N. E. Rep. 446.

170. RAILROAD—Private Connecting Lines—Negligence. ——A railroad company is not responsible for the negligence of engineers of trains on private connecting lines.—*Bunting v. Pennsylvania, etc. Co.*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 448.

171. RAILROAD—Trespasser.—— Where a person attempts to cross a track at a point other than a public or private crossing, he is a trespasser, and the railroad company is not responsible for his death if he is killed by a passing train.—*Comly v. Pennsylvania, etc. Co.*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 496.

172. REFERENCE—Long Account.——An account containing some twenty different charges for legal services, rendered in different actions, is a long account, justifying a reference, under Wisconsin laws.—*Nachtsheim v. Turner*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 637.

173. REMOVAL OF CAUSES—Intoxicating Liquors.—— A defendant cannot remove a suit against him for keeping a saloon for the sale of liquors, under the Iowa law, to the federal court, on the ground that he may be deprived of his property without compensation.—*Dickinson v. Heeb B. Co.*, S. C. Iowa, March 7, 1888; 36 N. W. Rep. 651.

174. REPLEVIN—Verdict — Ownership. —— When the verdict finds the plaintiff to be the owner of part of the property sought to be recovered, but makes no finding as to the rest, it will not support a valid judgment.—*Carrier v. Carrier*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 626.

175. SALE—Conditional—Mortgage.—— A note given in part payment for personal property, containing a provision that the title shall remain in the vendor until the note is paid, with the right upon default to take possession of the property without refunding any money previously paid, is an absolute sale with a mortgage back.—*Baldwin v. Crow*, Ky. Ct. App., Feb. 14, 1888; 7 S. W. Rep. 146.

176. SALE—Fertilizers—Inspections.——Sales of fertilizers without inspection, which must be made in the State, are unlawful, and such contracts will not be enforced.—*Hammond v. Wilcher*, S. C. Ga., Nov. 22, 1887; 5 S. E. Rep. 113.

177. SPECIFIC PERFORMANCE—Damages. —— Defendants cannot complain that the plaintiff in possession is allowed to recover damages in case they fail to convey within a certain time.—*Evans v. Miller*, S. C. Minn., March 5, 1888; 36 N. W. Rep. 640.

178. SUNDAY—Soda Water.——Selling soda water on Sunday is a violation of the Pennsylvania Sunday law of 1794.—*Splane v. Commonwealth*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 431.

179. SUBROGATION—Laches—Oil Lease.——Petitioners claiming that they are owners of an oil lease upon lands about to be sold under a judgment, and claiming to be subrogated to the rights of the judgment creditors or guilty of laches, if they file their petition at the last moment before the sheriff's sale, are not entitled to subrogation.—*Appeal of Forest, etc. Co.*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 442.

180. TAXATION—Collection by Suit.——A judgment of the circuit court in a back tax-suit is the judgment of a court of general jurisdiction, proceeding under the common law, and cannot be attacked collaterally as to matters which were matters of defense. A judgment against several tracts of land in a joint sum is only erroneous, and a purchaser thereunder is not affected by the error. Such party is not affected by a review of the judgment in proceedings to which he is not a party.—*Jones v. Driskell*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 111.

181. TAXATION—Deed—Description.——When a tax-deed describes several distinct tracts of land, and the granting clause states that the real property last hereinbefore described is conveyed, only the last tract is conveyed.—*Spicer v. Howe*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 825.

182. TAXATION—Tax-deeds—County Lands.——A tax-deed on lands then held by a county for no pecuniary profit passes no title.—*Callanan v. Wayne Co.*, S. C. Iowa, March 7, 1888; 36 N. W. Rep. 654.

183. TAXATION—Towns—Exemptions.——The law allowing a township trustee, with the consent of the

board of county commissioners, to levy taxes on the property of citizens of his township, is unconstitutional.—*Atchison, etc. R. Co. v. Johnson*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 798.

184. TELEGRAPH COMPANIES— Negligence — Damages. ——Under Wisconsin laws, telegraph companies are liable for the damages resulting directly from their negligence in transmitting messages, especially when the company's agent is acquainted with the contents and significance of the message.—*Cutts v. Western, etc. Co.*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 627.

185. TOWNS — Municipality — Alteration. —— Though a city of the second class is carved out of a township, the remainder thereof is a township, and its officers, who reside in the city, are still *de facto* officers, at least. The township cannot escape its liabilities by altering its boundaries and changing its name.—*Walnut Tp. v. Jordan*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 812.

186. TROVER—Demand.—— Where defendant, with a constable, went to plaintiff's farm and took away sundry sheep, which he claimed as his own, it was not necessary that plaintiff should make a demand for the sheep before bringing an action of trover.—*Springer v. Groome*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 446.

187. TROVER—Husband and Wife—Chattel Mortgage. ——The fact that one has a chattel mortgage on a cow, executed by a husband, and takes the cow from the premises of the wife, does not authorize her to maintain trover for the value of the cow.—*Lewis v. Beckler*, S. J. C. Mass., Jan. 3, 1888; 12 Atl. Rep. 627; 5 N. Eng. Rep. 690.

188. TRUSTS—Funds—Conversion — Following. —— A deposited bonds with a banker for safe keeping, which he converted to his own use. The proceeds found their way into the hands of the banker's assignee for the benefit of his creditors: *Held*, that A must be first paid out of the assets.—*Bowers v. Evans*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 629.

189. VENUE—Change—Prejudice.——Where a change of venue in a civil case is sought on the ground of prejudice in the trial judge, the court may order its change to a circuit where the affidavit alleged that the same prejudice exists, under Wisconsin law.—*McCrory v. McCrory*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 608.

190. WATER AND WATER-COURSE—Subsurface Streams. ——The owner of a spring is not liable for diverting the water flowing from it so as to answer his own purposes, because in so doing he may have cut off the source of subsurface streams, are percolation that supply the water of his neighbor spring.—*Bloodgood v. Ayers*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 433.

191. WHARVES—Care—Negligence.——The owner of a wharf is bound to have it supplied with all suitable appliances for the uses for which it is designed, and must exercise the utmost care for the safety of the craft which uses the wharf, and is liable in damages for any negligence in these matters.—*Hilley v. City of Allegheny*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 453.

192. WILL — Advancements — Legacy. ——Where a legacy is given by a will from which an advancement is to be deducted, the principal of such advancement only should be deducted and not the interest thereon.—*Wilkins v. Wilkins*, N. J. Ct. Err. & App., Feb. 2, 1888; 12 Atl. Rep. 620.

193. WILL — Charge on Realty.——A testator after providing for payment of her debts, added that she desired that $1,000 be paid to B, and then devise the residue of her estate. The personal estate was insufficient to pay the debts and this legacy: *Held*, that the legacy was a charge on the realty.—*Hutchinson v. Gilbert*, S. C. Tenn., January Term, 1888; 7 S. W. Rep. 126.

194. WILL—Construction.——Upon the construction of a will which was complicated and the details of which are given at length, it was held that under its terms the provision made for the support of children for each year must be supplied by the income of that year, and could not be charged against the surplus arising during another year.—*Appeal of Brewster*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 470.

195. WILL — Construction — Legacy — Payment.—— Where, by a will, the executors were directed to pay to a theological seminary $600 a year until it should be convenient for them to pay $10,000: *Held*, that the first year upon which the payment of $600 began to run was to be reckoned from the death of the testator.—*Appeal of McDaniel*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 478.

196. WILL—Legacy—Contingency.——Where a legacy is given to take effect upon the death of a person named, and the legatee survives the testator, but dies before the death of the person named, the representatives of the legatee are not entitled to the legacy.—*Appeal of Gorgas*, S. C. Penn., Feb. 6, 1888; 12 Atl, Rep. 418.

197. WITNESS — Competency — Deceased Person.—— The holder of a note on which a deceased person was an indorser, is a competent witness, in Michigan, to prove the date of the indorsement in an action against the maker, although the party defending the action for the maker was an executor of the deceased indorser.—*Hillman v. Schwenk*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 670.

198. WITNESS—Deceased Person.——Where a surety has paid a note and brought an action against the estate of his deceased principal, the maker of the note is a competent witness to prove that the deceased was the principal debtor and not of cosurety with the plaintiff. —*Canfield v. Bentley's Admr.*, S. C. Vt., Feb. 22, 1888; 5 N. Eng. Rep. 736; 12 Atl. Rep. 655.

199. WITNESS—Examination—Repetition.——When a witness has once answered a question, it is not error to refuse to permit the question to be answered a second time, especially when it is asked to lay the foundation to impeach him.—*Hughes v. Ward*, S. C. Kan., Feb. 11, 1888; 16 Pac. Rep. 810.

200. WITNESS—Interest—Competency.——One is not incompetent as a witness who has no title to the land in controversy, makes no claim thereto, is not a party to the suit nor liable for costs, although he may have owned a tract of land which formed part of a tract, the division of which was one of the questions in the case.—*Berg v. McLaferty*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 460.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 20.

A, having a policy of insurance of $2,000 on his farm building, borrowed $5,000 of B, and secured the loan by a mortgage on the farm, and assigned the policy to B as mortgagee as collateral. A afterwards wanted to obtain $2,000 additional insurance for his own protection, and did so, and requested B to notify the first company thereof, which B, still holding that policy, promised to do. B never did so, and the buildings were burned. A brought suit on the first policy, and the company defended the suit at law successfully on the ground of want of notice of the subsequent insurance. B afterwards foreclosed his mortgage. Can A set up in equity as a defense *pro tanto*, B's failure to fulfill his promise to notify the first company of the later insurance, and his (A's) consequent loss?

J. H. S.

QUERY NO. 21.

A died in 1870, seized of 900 acres of land in Arkansas, a hundred acres of which is improved, and upon which he resided at the time of his death. He left B, his relict, and C, an infant son, surviving. Dower is

assigned B, including the usual residence and the cleared land, which she conveys to a stranger D. The infant claims a homestead out of the same land assigned as a dower, and seeks to recover rents and profits since his father's death. Can he recover? H.

QUERIES ANSWERED.

QUERY No. 18 [*26 Cent. L. J. 359.*]

Section 626, Rev. Stat. of Indiana of 1881, provides, "that the party objecting to a decision must except at the time the decision is made, but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court." The court under this section grants a party ninety days beyond the term to prepare and file his bill of exceptions. The judge, before the expiration of the time, leaves the State and goes, say to Madison, Wisconsin, and does not return until the expiration of the time. The party completes his bill before the time expires and has it ready for the signature of the judge, who, upon his return after the time has expired, refuses to sign it for the reason that the time given has expired. Is the judge responsible in damages to the injured party? FORENSIC.

Answer. Judges are not civilly liable in such cases. 5 Wait's Act. & Def. 30. *Mandamus* from a higher court to compel the judge to sign the bill of exceptions, is the proper remedy.

Another Answer. The authorities are very much in conflict upon the question of the liability of judges for fraudulent, negligent and corrupt conduct in the discharge of their judicial duties. But, however this may be, all inferior courts in Indiana are required to perform both judicial and ministerial acts. When the court had heard the evidence and considered the cause and rendered the judgment and determined the rights of the parties, his judicial act was complete and ended. The signing of the record and bill of exceptions were ministerial acts for the non-performance of which an action in damages will lie against the judge. Fairchild v. Wells *et al.*, 29 Ohio St. 156; Hall v. Tuttle, 6 Hill, 38; Walrod v. Shuler, 2 Comst. 134; Fish v. Emerson, 49 N. Y. 377; Mathews v. Houghton, 11 Me. 377.

Still Another Answer. The statutes of Arkansas are like those of Wisconsin, and have been construed; that after the time granted for the presentation of the bill of exceptions has expired, no matter for what cause, it cannot be signed by the judge, and if he does sign it it will not be regarded by the appellate court; but for fraud, accident or mistake, not imputable to appellant or his attorneys, equity will grant relief by granting a new trial. Leigh v. Armor, 35 Ark. 123; Valentine v. Holland, 40 Ark. 338. Of course the judge would not be responsible in damages to the injured party, as he can obtain a new trial at law by the aid of a court of equity. S. & F.

QUERY No. 19 [*26 Cent. L. J. 359.*]

A owns a note of $200 against B, who has removed to a distant town. A hands the note to C, an attorney, asking him to collect the same. C forwards note to D, an attorney, who resides in same town where B now lives. D succeeds in collecting amount, but refuses to remit any portion of it. Is C liable to A for the dishonesty or insolvency of D? Please quote authorities. Y.

Answer. C's liability depends upon the understanding or agreement between A and C. If C agreed to collect the note or signed a receipt that he had received it for collection, it seems he is liable. Bradstreet v. Everson, 72 Pa. St. 124; Morgan v. Tener, 83 Pa. St. 305. Otherwise we think C is not liable, for A must have understood that he expected to send the note to another attorney for collection A.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS, Containing the Cases of General Value and Authority Decided in the Courts of the Several States from the Earliest Issue of the States Reports to the Year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law, and Author of Treatises on the "Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vol. XCVI. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

The ninety-sixth volume of this excellent series now lies before us, and as the cases reported in it where decided chiefly in 1867 and 1868, and under the plan of the work the series was designated to close in 1869, we presume that this is among the last of these volumes which we shall have the pleasure of examining. The cases reported in this volume being the most modern are, other things being equal, of much more value than those which precede it, and on this as on all the others the learned and experienced editor has bestowed great care and labor, enriching them with notes and references of at least equal value to that of the text of the opinions. We need hardly say that in every respect the volume before us is fully up to the standard of the series, and well worthy of the favorable consideration of the profession.

JETSAM AND FLOTSAM.

A JUDGE'S WIT. — Baron Alderson, an English judge, was noted for his dry humor, of which the following anecdote exhibits a specimen:

A country politician brought on action for libel against the proprietor of a local paper, who had editorially likened him to an ass. When counsel for the plaintiff rose to make his opening speech, Baron Alderson interrupted his first sentence.

"For whom do you appear?" said the judge.

"For whom do I appear?" echoed the astonished barrister.

"Yes," said his lordship, dryly; "I merely want to know. Do you complain on behalf of the man for being compared to the ass, or do you complain on behalf of the ass for being compared to the man?"

A FORTUNATE LOSS.—Lord Thurlow, one of the greatest of English chancellors, had an ungovernable temper, which was a sore trial to his friends. Its outbursts at his family table, even when surrounded by guests, were humiliating. At cabinet meetings, when his will was crossed, he sometimes stormed at his colleagues like a fish-woman.

Even in the presence of royalty his passion broke over all restraint, and compelled sharp rebukes from the king. On one occasion, George the Third, who was noted for his gracious courtesy, contrived to reprove him by a jest, and the great chancellor's friends never allowed him to forget it. He came late to some important meeting, at which the king presided, and apologized for tardiness by saying that, in an interview by the way, he had lost his temper.

"Allow me to congratulate you, my lord," said the king with great suavity; "I hope you may never find it, for it was the worst temper I ever knew."